

9
No. 94-947-CFX
Status: GRANTED

Title: National Labor Relations Board, Petitioner
v.
Town & Country Electric, Inc., and Ameristaff
Personnel Contractors, Ltd.

Docketed:

November 23, 1994 Court: United States Court of Appeals for
the Eighth Circuit

Counsel for petitioner: Solicitor General

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Entry	Date	Note	Proceedings and Orders
1	Nov 23 1994	G	Petition for writ of certiorari filed.
2	Dec 23 1994		Brief of respondent Town & County Electric, Inc. in opposition filed.
3	Dec 28 1994		DISTRIBUTED. January 13, 1995 (Page 5)
4	Jan 5 1995	X	Reply brief of petitioner filed.
6	Jan 17 1995		REDISTRIBUTED. January 20, 1995 (Page 17)
7	Jan 23 1995		Petition GRANTED. *****
9	Mar 2 1995		Order extending time to file brief of petitioner on the merits until March 17, 1995.
10	Mar 15 1995		Brief amicus curiae of International Brotherhood of Boilermakers, etc. filed.
11	Mar 16 1995		Joint appendix filed.
12	Mar 16 1995		Brief of petitioner National Labor Relations Board filed.
13	Mar 17 1995		Brief of respondent International Brotherhood of Electrical Workers Local 292 in support of petitioner filed.
14	Mar 17 1995		Brief amicus curiae of American Civil Liberties Union filed.
15	Apr 18 1995		LODGING by respondents. 20 copies of article "Salting the Contractors' Labor Force: Construction Unions Organizing with NLRB Assistance" by Herbert R. Northrup, published Journal of Labor Research, Volume XIV, Number 4, Fall 1993.
19	Apr 18 1995		Brief amici curiae of Associated Builders and Contractors, Inc., et al. filed.
16	Apr 19 1995		Brief of respondent Town & Country Electric, Inc. filed.
17	Apr 19 1995		Brief amicus curiae of Chamber of Commerce of the United States of America filed.
18	Apr 19 1995		Brief amicus curiae of Labor Policy Association filed.
20	Apr 19 1995		Brief amicus curiae of Associated General Contractors of America filed.
22	May 19 1995		Reply brief of petitioner National Labor Relations Board filed.
21	May 22 1995		Reply brief of respondent International Brotherhood of Electrical Workers, local 292 filed.
23	Jul 28 1995		CIRCULATED.
24	Aug 1 1995		SET FOR ARGUMENT TUESDAY, OCTOBER 10, 1995. (2ND CASE).
25	Aug 4 1995		Record filed.
		*	Partial record proceedings United States Court of Appeals for the Eighth Circuit.
26	Aug 14 1995		Record filed.

No. 94-947-CFX

Entry	Date	Note	Proceedings and Orders
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		*	Original agency record proceedings National Labor Relations Board (BOX).
27	Oct 10 1995		ARGUED.

①

No.

94 947 NOV 23 1994

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In the Supreme Court of the United States

OCTOBER TERM, 1994

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

TOWN & COUNTRY ELECTRIC, INC., AND AMERISTAFF
PERSONNEL CONTRACTORS, LTD.

**PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

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QUESTION PRESENTED

Whether the National Labor Relations Board reasonably determined that a person applying for or holding a job with an employer that he intends to organize, and who will be compensated by a union for his organizational activity, is an "employee" within the meaning of Section 2(3) of the National Labor Relations Act (29 U.S.C. 152(3)) and therefore protected against discrimination on account of his union activity and affiliation.

II

PARTIES TO THE PROCEEDINGS

In addition to the parties listed in the caption, the following was a party to the proceedings in the court below: International Brotherhood of Electrical Workers, Local 292.

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No.

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v.

TOWN & COUNTRY ELECTRIC, INC., AND AMERISTAFF
PERSONNEL CONTRACTORS, LTD.

**PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

The Solicitor General, on behalf of the National Labor Relations Board, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals, App., *infra*, 1a-11a, is reported at 34 F.3d 625. The decision and order of the National Labor Relations Board, App., *infra*, 12a-42a, and the decision and recommended order of the administrative law judge, App., *infra*, 43a-135a, are reported at 309 N.L.R.B. 1250.

JURISDICTION

The judgment of the court of appeals was entered on August 31, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

(1)

STATUTORY PROVISION INVOLVED

Section 2(3) of the National Labor Relations Act (Act), 29 U.S.C. 152(3), provides:

The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless this [Act] explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act [45 U.S.C. 151 et seq.], as amended from time to time, or by any other person who is not an employer as herein defined.

STATEMENT

This case involves the determination of the National Labor Relations Board (Board) that a "paid union organizer" applying for or holding a job with an employer that he intends to organize is an "employee" within the meaning of Section 2(3) of the Act and is therefore entitled to the protections that the Act affords to employees.¹ The Board thus held

¹ The term "paid union organizer," as used by the Board in its decisions and as used in this petition, encompasses both (1) union officials who draw a salary from the union, and

that respondents had violated the Act by refusing to consider union-member applicants for employment on account of their union affiliation, and by discharging a newly hired union-member employee for engaging in organizational activity protected by the Act. The court of appeals refused to enforce the Board's order, holding that the Board had erred in concluding that paid union organizers are "employees" under the Act.

1. Respondent Town & Country Electric, Inc., is a large nonunion electrical contractor based in Wisconsin. In early September 1989, Town & Country was awarded a contract to perform electrical renovation work at a paper mill in International Falls, Minnesota. App., *infra*, 2a. After being awarded the contract, Town & Country learned that Minnesota requires an electrical contractor to employ at least one electrician licensed by that State for every two unlicensed electricians working at a job site. At the time, none of Town & Country's electricians had a Minnesota license. *Ibid*.

To help it recruit Minnesota-licensed electricians, Town & Country retained respondent Ameristaff Personnel Contractors, Ltd., an employment agency. App., *infra*, 2a. Town & Country instructed Ameristaff that applicants had to be able to work in a non-union shop. *Id.* at 16a. On September 3, 1989, Ameristaff advertised for "licensed journeymen electricians" in a Minneapolis newspaper. Applicants responding to the advertisements were asked, *inter alia*, whether they preferred to work union or non-union. *Ibid*. Ameristaff arranged for interviews with

(2) union members to whom the union pays a stipend in return for their organizational efforts. This case involves persons in both categories.

seven applicants to be held September 7, 1989, at a Minneapolis hotel. *Id.* at 2a-3a, 16a.

Members of the International Brotherhood of Electrical Workers, Locals 292 and 343 (the Union), learned of the job. The Union encouraged its unemployed members to apply, with the understanding that those members, if hired, would attempt to organize the job site. The Union had established a fund to reimburse members for wage, travel, and health-benefit differentials incurred on nonunion jobs. App., *infra*, 16a.

On September 7, 1989, officials of respondents appeared at the hotel to interview applicants. Only one of the seven applicants with a scheduled interview was present. App., *infra*, 3a. Also present for interviews were approximately one dozen members of the Union, two of whom were full-time paid union officials, and the rest of whom were unemployed electricians. *Id.* at 3a, 17a. Respondents' officials interviewed the nonunion applicant and a union member who had no appointment but who stated that he had to leave soon to care for his children. Neither was hired. *Id.* at 3a, 17a.

Steven Buelow, Ameristaff's president, then advised the remaining applicants, all of whom were union members, that the job was nonunion. The union members stated that they were interested in any job available. App., *infra*, 18a. Buelow then advised Ron Sager, Town & Country's manager of human resources, that he had concluded that the remaining applicants were all "union." *Id.* at 3a, 18a. Sager thereupon cancelled further interviews. *Id.* at 3a, 18a.

One of the unemployed union members, Malcolm Hansen, protested that he had called Ameristaff that

morning and had been told to report for an interview at the hotel, and that he would refuse to leave until interviewed. App., *infra*, 3a, 18a-19a. Sager at first threatened to have the union members forcibly removed. *Id.* at 19a. Sager then stated that he would check on Hansen's situation and honor the commitment to Hansen if Hansen's account was verified. *Ibid.* Upon obtaining verification of that account, Sager interviewed Hansen, and hired him. *Id.* at 3a-4a, 19a. Sager advised the remaining union members that he would not interview them, despite Town & Country's stated need for more than one licensed electrician, and despite the fact that only five days remained before work on the project was to commence. *Id.* at 19a, 56a.

Hansen's job began on September 12, 1989. The following day, during a recess, Hansen announced that he was seeking to organize employees for the Union. App., *infra*, 4a, 91a. Town & Country's project superintendent, who was present, immediately telephoned his superiors. When he returned from the call, he told Hansen that Hansen would be fired if he continued to talk about the Union. *Id.* at 91a-92a. The following day, at the noon recess, Hansen sought to convince the work crew of the merits of union organization. *Id.* at 102a. Later that day, Hansen was discharged. *Id.* at 4a, 100a, 106a-107a.²

² The company's stated reason for the discharge was that it had terminated its contract with Ameristaff, having learned that, under Minnesota law, an electrical contractor could not use temporary employees such as Hansen from an employment agency; rather, all employees had to be directly employed by the contractor. Town & Country, however, rejected Hansen's request that the company hire him directly. App., *infra*, 4a, 107a.

2. The Board's General Counsel issued a complaint alleging, *inter alia*, that respondents violated Section 8(a)(1) and (3) of the Act, 29 U.S.C. 158(a)(1) and (3), by refusing to consider the union members for employment because of their union affiliation, and by terminating Hansen because of his union activities.³ Respondents contended that they had acted for nondiscriminatory reasons, and that, in any event, neither the applicants nor Hansen were bona fide "employees" within the meaning of Section 2(3) of the Act, 29 U.S.C. 152(3). App., *infra*, 20a-21a.

a. The administrative law judge (ALJ) found that respondents had violated Section 8(a)(1) and (3) of the Act. He found that respondents had refused to consider the job applicants for employment because of their presumed union affiliation. App., *infra*, 56a-69a. He further found that Town & Country had terminated Hansen's employment because of his attempts to unionize the other electricians. *Id.* at 109a. The ALJ rejected Town & Country's claim that Hansen had been fired for poor performance, terming that claim a "thinly veiled attempt to mislead as to the true reasons" for the discharge, and

³ Section 8(a)(1) of the Act makes it an unfair labor practice "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in [Section 7]." 29 U.S.C. 158(a)(1). Section 7 of the Act grants employees the right, *inter alia*, "to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining." 29 U.S.C. 157. Section 8(a)(3) of the Act makes it an unfair labor practice to discriminate "in regard to hire or tenure of employment * * * to encourage or discourage membership in any labor organization." 29 U.S.C. 158(a)(3).

finding the claim to be "lacking in credible support." *Id.* at 121a.

The ALJ also rejected respondents' claim that the union members were not "employees" under the Act. Following the Board's ruling in *H.B. Zachry Co.*, 289 N.L.R.B. 838 (1988), enforcement denied, 886 F.2d 70 (4th Cir. 1989), that paid union organizers are "employees" within the meaning of Section 2(3) of the Act, the ALJ found that the two union officials and the other union members who had applied for employment were protected by the Act against discrimination based on their union activity or affiliation. App., *infra*, 53a n.13. Hansen's goal of organizing the other electricians did not deprive him of the Act's protection, the ALJ held. Rather, Hansen was "a rank-and-file union member," and "was dependent financially on employment as a journeyman electrician in the construction industry." *Id.* at 107a n.69. Thus, "Hansen's intention to organize was not incompatible with his basic employment needs and objectives and did not debar him from statutory protection." *Ibid.*

b. The Board, in agreement with the ALJ, concluded that respondents had violated Section 8(a)(1) and (3) of the Act, by refusing to interview the union members and by discharging Hansen. App., *infra*, 12a-42a.⁴

The Board reconsidered and reaffirmed its position in *Zachry* that paid union organizers are "employees" within the meaning of Section 2(3) of the Act and are therefore protected against discriminatory refusals to hire and discriminatory termina-

⁴ The Board adopted the ALJ's findings of fact. App., *infra*, 13a & n.3.

tion. App., *infra*, 22a, 32a-33a.⁵ The Board noted that applicants for employment have been held to be "employees" within the meaning of Section 2(3) ever since *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177 (1941). App., *infra*, 22a. The fact that an applicant is a paid union organizer seeking to unionize an employer's work force does not change that result, the Board reasoned. Section 2(3) defines "employee" as "any employee," and paid union organizers do not fall within any of the Act's specific exclusions. *Id.* at 23a-24a. Moreover, both the legislative history and this Court's interpretations of the Act support a broad definition of the statutory term "employee." *Id.* at 24a-29a. For a paid union organizer simultaneously to be an "employee" of another entity also comports with the common law principles of agency to which this Court has looked to define the term "employee" in cases in which it was left undefined by statute, the Board concluded. Under the common law, "[a] person may be the servant of two masters, not joint employers, at one time as to one act, if the service to one does not involve abandonment of the service to the other." *Id.* at 28a (quoting Restatement (Second) of Agency § 226, at 498 (1958)). Finally, protecting paid union organizers as "employees" furthers the Act's goal of promoting the right to organize, while leaving intact management's legitimate rights to direct and control employees under its supervision and to limit union solicitation to nonwork time. *Id.* at 33a-39a.

As a remedy, the Board adopted the ALJ's recommended order that Town & Country, *inter alia*, offer

⁵ The Board reached the same result in a companion case. See *Sunland Construction Co.*, 309 N.L.R.B. 1224 (1992).

employment to Hansen and the union members who had been denied interviews, and make the union members whole for any losses suffered as a result of Town & Country's discrimination. App., *infra*, 40a, 131a-133a.⁶

3. The court of appeals accepted respondents' contention that a paid union organizer is not an "employee" within the meaning of Section 2(3) of the Act, and denied enforcement of the Board's order.⁷ App., *infra*, 1a-11a. The court noted that the circuits are split on whether paid union organizers are employees under the Act, with the District of Columbia, Second, and Third Circuits holding that they are, and the Fourth and Sixth Circuits holding that they are not. *Id.* at 5a-7a; see *Willmar Electric Service, Inc. v. NLRB*, 968 F.2d 1327, 1329-1331 (D.C. Cir. 1992), cert. denied, 113 S. Ct. 1252 (1993); *NLRB v. Hellen Manufacturing Co.*, 599 F.2d 26, 30 (2d Cir. 1979); *H.B. Zachry Co. v. NLRB*, 886 F.2d 70, 72 (4th Cir. 1989); *NLRB v. Elias Brothers Big Boy, Inc.*, 327 F.2d 421, 427 (6th Cir. 1964); see also *Escada (USA) Inc. v. NLRB*, 970 F.2d 898 (3d Cir. 1992) (Table).

⁶ The Board left to compliance proceedings the determination of how many electricians Town & Country would have hired absent its antiunion discrimination, and thus how many of the 10 applicants were actually entitled to a remedy. App., *infra*, 130a.

⁷ The court of appeals did not disturb the Board's findings of fact. In the court of appeals, respondents did not contest the Board's findings that they had violated Section 8(a)(1) of the Act by interrogating job applicants about their union membership, banning union activity during nonwork time, and threatening to discharge Hansen if he did not refrain from engaging in such activity. NLRB C.A. Br. 14-15.

The court of appeals found the Fourth Circuit's reasoning in *Zachry* to be persuasive. App., *infra*, 7a. The court stated that it found the definition of "employee" in the Act to be of "little help." *Ibid.* Instead, the court looked to the common law for guidance. It noted that an individual may be "the servant of two masters at one time only if service to one does not involve abandonment of or conflict with service to the other." *Id.* at 8a (citing Restatement, *supra*, § 226, at 498). Ordinarily, a job applicant may be simultaneously loyal to his union and to his nonunion employer, the court stated. *Ibid.* But the Union's two full-time organizers "were not typical applicants," the court stated, because they already had a job and "wanted to enter Town & Country's work force not for financial gain, but to organize its workers." *Ibid.* And "[w]hen a union official applies for a position only to further the union's interests, * * * an inherent conflict of interest exists," the court reasoned, for "the union official will follow the mandates of the union, not his new employer." *Id.* at 8a-9a. For example, "[i]f the union asks him to quit working for his second employer, he will do so." *Id.* at 9a. Further, the court stated, a full-time union official "has a reduced incentive to be a good employee for his second employer," because, if terminated, "he simply returns to his full-time union job." *Ibid.*

The court of appeals further held that the unemployed electricians who belonged to the Union (including Hansen) were also not "employees" within the meaning of Section 2(3) of the Act, because they "were also under [the Union's] control." App., *infra*, 9a. The court based this conclusion on three factors. First, the unemployed union members had been en-

couraged by the Union to apply. *Ibid.* Second, the Union had committed to paying the difference between their salaries and union-scale wages. *Ibid.* Third and most important, the court noted that the union members in this case were subject to the Union's "job salting organizing resolution," which provided that members could work for nonunion employers "only if they work for organizational purposes," and that union members were to leave the nonunion job upon notification by the Union. *Id.* at 9a-10a. That last provision, the court stated, was "controlling," for a union's "control over a putative employee's job tenure * * * is inimical to, and inconsistent with, the employer-employee relationship." *Id.* at 10a.

REASONS FOR GRANTING THE PETITION

The Board has long held that a paid union organizer is an "employee" within the meaning of Section 2(3) of the National Labor Relations Act (Act), 29 U.S.C. 152(3), and is therefore protected against discrimination because of his union activities or affiliation. The Eighth Circuit's rejection of the Board's position deepens a conflict in the circuits on that issue, with three circuits accepting the Board's interpretation and three circuits rejecting it. The question is a recurring one that is important to the administration of the Act. In order to resolve the conflict and to reaffirm that judicial deference is owed to the Board's interpretations of the Act where, as here, its positions are rational and consistent with the statute, this Court's review is warranted.

As this Court has often explained, Congress gave the Board the "primary responsibility for developing

and applying national labor policy." *NLRB v. Curtin Matheson Scientific, Inc.*, 494 U.S. 775, 786 (1990); see *Beth Israel Hosp. v. NLRB*, 437 U.S. 483, 500-501 (1978); *NLRB v. Erie Resistor Corp.*, 373 U.S. 221, 236 (1963). Where the Act does not speak directly to an issue, the Court gives "considerable deference" to the Board's interpretation and will uphold it if it is "rational and consistent with the Act," even if the Members of this Court "would have formulated a different rule had [they] sat on the Board." *Curtin Matheson*, 494 U.S. at 786-787; *NLRB v. United Food & Commercial Workers Union*, 484 U.S. 112, 123 (1987); *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27, 42 (1987); see *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Those principles apply with special force when the interpretation in question is a "consistent, longstanding interpretation of the NLRA by the Board." *NLRB v. Hendricks County Rural Electric Membership Corp.*, 454 U.S. 170, 189-190 (1981); see also *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 401-402 (1983); *Bayside Enterprises, Inc. v. NLRB*, 429 U.S. 298, 303 (1977). In light of these principles, the court of appeals erred in rejecting the Board's statutory interpretation.

1. The Act does not expressly address whether it applies to a paid union organizer who applies for work with an employer, while retaining an affiliation with the union and intending to engage in organizational activity. But it has long been established that an applicant for work is an "employee" under the Act. See *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177 (1941). And the Act defines "employee" broadly to include "any employee," 29 U.S.C. 152(3), subject to six specific exclusions, none of which embraces a

paid union organizer who applies for a job with another employer. As this Court has observed, "[t]he breadth of § 2(3)'s definition is striking: the Act squarely applies to 'any employee[]' [and] [t]he only limitations are specific exemptions" in the statute. *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 891 (1984). In *Sure-Tan*, this Court held that undocumented aliens "plainly come within the broad statutory definition of 'employee'" because they "are not among the few groups of workers expressly exempted by Congress." *Id.* at 892. The Court specifically noted that "the Board's construction of th[e] term ['employee'] is entitled to considerable deference, and we will uphold any interpretation that is reasonably defensible." *Id.* at 891.⁸

This Court has indicated that common law principles inform the interpretation of the term "employee" unless Congress "clearly indicates otherwise." *Nationwide Mutual Insurance Co. v. Darden*, 112 S. Ct. 1344, 1349 (1992) (construing ERISA; referring to other statutes, including the Act). The common law imposes no per se prohibition against concurrent employment by two entities, such as by an employer and a union. On the contrary, as the

⁸ See also *NLRB v. Hearst Publications, Inc.*, 322 U.S. 111 (1944) (sustaining Board holding that newsboys who might be considered independent contractors under state law are "employees"); *Packard Motor Car Co. v. NLRB*, 330 U.S. 485 (1947) (sustaining Board holding, prior to the addition to the statute of language excluding "any individual employed as a supervisor," that supervisors and foremen are "employees"); *NLRB v. E.C. Atkins & Co.*, 331 U.S. 398 (1947) (sustaining Board holding that war-production employer's security personnel, who were required by the government to be hired as "civilian auxiliaries to the military police," are "employees").

District of Columbia Circuit has noted in holding that a paid union organizer is an "employee" within the meaning of Section 2(3) of the Act, "[u]nder common law principles '[a] person may be the servant of two masters, not joint employers, at one time as to one act, if the service to one does not involve abandonment of the service to the other.'" *Willmar Electric Service, Inc. v. NLRB*, 968 F.2d 1327, 1329-1330 (1992) (quoting Restatement (Second) of Agency § 226, at 498 (1958), and citing *Kelley v. Southern Pac. Co.*, 419 U.S. 318, 324 (1974)), cert. denied, 113 S. Ct. 1252 (1993). Thus, nothing in the text of the Act excludes paid union organizers applying for a job from the class of "employees" covered by the Act.⁹

⁹ Nor, as the Board noted, is there anything in the legislative history of Section 2(3) that requires excluding a person who is actually performing work for hire for an employer from the scope of the statutory term "employee" simply because he is also a paid union organizer. App., *infra*, 24a-26a. As enacted in 1935, the structure and wording of Section 2(3) were quite similar to its current version, although with fewer express exceptions. See National Labor Relations Act, ch. 372, § 2(3), 49 Stat. 450 (1935). The history of that provision indicates that Congress used the term "employee" to embrace generally the class of "workers," "wage earners," and "workmen" who comprise the work forces of "employers." See, e.g., 79 Cong. Rec. 9686 (1935) (Rep. Connery) (referring to "every man on a pay roll"), reprinted in II Legislative History of the National Labor Relations Act of 1935, at 3119 (1949) [hereinafter *NLRA Leg. Hist.*]; *National Labor Relations Board: Hearings on S. 1958 Before the Senate Comm. on Educ. and Labor*, 74th Cong., 1st Sess. 42 (1935) (Sen. Wagner) (referring to "the workers"), reprinted in I *NLRA Leg. Hist.* 1418.

Although Congress, in 1947, amended Section 2(3) to exclude certain additional categories of individuals from its coverage (see Labor Management Relations Act, 1947, ch.

2. The Board has determined, as an exercise of its authority to interpret the Act's provisions, that paid union organizers do come within the scope of the term "employee" as defined in the Act. That position is of long duration, see *Oak Apparel, Inc.*, 218 N.L.R.B. 701 (1975), and has been adhered to consistently. In this case and in a companion case, see *Sunland Construction Co.*, 309 N.L.R.B. 1224 (1992), the Board thoroughly reexamined the issue and reaffirmed its view that the Section 2(3) definition of "employee" covers paid union organizers.

As the Board explained in this case and in *Sunland*, affording the Act's protection to paid union organizers furthers the policies of the Act. "The right to organize is at the core of the purpose for which the statute was enacted." App., *infra*, 33a; *Sunland*, 309 N.L.R.B. at 1229; see *American Hosp. Ass'n v. NLRB*, 499 U.S. 606, 609 (1991). A flat rule that an employer may reject an applicant based on its hostility to that person's desire to organize the work force would be antithetical to that core purpose. App., *infra*, 34a; *Sunland*, 309 N.L.R.B. at 1229.

120, § 101, 61 Stat. 137), it did not otherwise limit the broad scope of that provision. Indeed, in contemporaneously enacting Title III of the Labor Management Relations Act, 1947 (LMRA), 29 U.S.C. 185-187, Congress manifested an assumption that an "employee" may be employed simultaneously by a union and another entity. Although Section 302(a) of the LMRA, 29 U.S.C. 186(a), generally prohibits payments by an employer to an employee of a union, Section 302(c)(1) excepts from that ban payments made "to any * * * employee of a labor organization, who is also an employee * * * of such employer, as compensation for, or by reason of, his service as an employee of such employer." 29 U.S.C. 186(c)(1). See *Willmar Electric*, 968 F.2d at 1329. That provision thus expressly recognizes that a person can simultaneously be an "employee" of both a union and another employer.

The Board added that protecting paid union organizers against discrimination based on their union activity does not interfere with any legitimate management right. App., *infra*, 34a (citing *Phelps Dodge*, 313 U.S. at 182); *Sunland*, 309 N.L.R.B. at 1229. The Board noted that, "[w]hile working for the employer, the paid organizer is subject to its direction and control, and is responsible for performing assigned work." App., *infra*, 34a; *Sunland*, 309 N.L.R.B. at 1229. The employer may prohibit any employee, including paid organizers, from engaging in union activity during working time, but "[o]utside work time * * * the organizer—like other workers—is free to solicit for the union." App., *infra*, 34a (citing *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 803 n.10 (1945)); *Sunland*, 309 N.L.R.B. at 1229. The Board, citing its experience, also rejected the argument that its position could lead to "unions packing bargaining units with their paid functionaries." App., *infra*, 36a; *Sunland*, 309 N.L.R.B. at 1229. Under Board policy, "employee status is not synonymous with voter eligibility," and paid union organizers are excluded from voting where they are "temporary" employees or where they do not share a community of interests with fellow employees. App., *infra*, 35a-36a; *Sunland*, 309 N.L.R.B. at 1229. The Board also reiterated that "employers may lawfully refuse to hire individuals seeking temporary employment, where the refusal is based on neutral hiring policies, uniformly applied." App., *infra*, 36a n.32; *Sunland*, 309 N.L.R.B. at 1229 n.33.

The Board further rejected the claim that according employee status to paid union organizers is incompatible with "the adversary relationship between employer and union." App., *infra*, 36a; *Sunland*, 309

N.L.R.B. at 1229. That argument, the Board explained, assumes that "paid union organizers will engage in union activities to the detriment of work assigned by the employer or will embark on acts inimical to the employer's legitimate interests." App., *infra*, 37a; *Sunland*, 309 N.L.R.B. at 1230. But, the Board stated,

[t]he statute's premise is at war with the idea that loyalty to a union is incompatible with an employee's duty to the employer. The fact that paid union organizers intend to organize the employer's work force if hired establishes neither their unwillingness nor their inability to perform quality services for the employer. Indeed, because the organizers seek access to the jobsite for organizational purposes, engaging in conduct warranting discharge would be antithetical to their objective. No body of evidence has been presented that would support any generalized, or specific, finding that paid union organizers as a class have a significant, or indeed any, tendency to engage in such conduct.

App., *infra*, 37a; *Sunland*, 309 N.L.R.B. at 1230. The Board emphasized that paid union organizers are subject to the same disciplinary rules as any other employee, and therefore enjoy no "carte blanche in the workplace." App., *infra*, 38a; *Sunland*, 309 N.L.R.B. at 1230. And absent objective evidence, there is no reason for inferring that, "if hired, paid union organizers will engage in activities inimical to the employer's operations." App., *infra*, 38a; *Sunland*, 309 N.L.R.B. at 1230. Indeed, the Board noted, "a paid union organizer employee arguably poses no greater threat to an employer's property rights than a prounion employee who voluntarily engages in or-

ganizational activity." App., *infra*, 37a n.34; *Sunland*, 309 N.L.R.B. at 1230 n.35.¹⁰

3. In light of its careful weighing of the labor-relations interests involved, the Board's rule—that paid union organizers are covered by Section 2(3)—is certainly a rational one that is consistent with the statute. That is particularly so in light of the statute's broad definition of "employee," the comprehensiveness of which is emphasized by the very existence of the express exclusions from that definition. Accordingly, that rule is "entitled to deference from the courts." *Fall River Dyeing*, 482 U.S. at 42; *Curtin Matheson*, 494 U.S. at 796. The court of appeals, however, dismissed the broad language of the statute as being of "little help," App., *infra*, 7a, and refused to defer to the Board's resolution of the issue, or even to take into account the Board's considered appraisal of the policy interests involved. The court relied instead on its own perception of the harm to an employer of having a union organizer on his work force, in holding that such an organizer is not an "employee" protected by the Act. That holding was error.

The premise of the court of appeals' decision was that, unlike a "typical" union member who applies to

¹⁰ The Board in *Sunland* went on to consider whether the employer's refusal to hire an organizer who applied for work during a strike of the employer by his union violated Section 8(a)(1) and (3) of the Act. The Board held that, in the strike setting, the refusal to hire was not unlawful discrimination. 309 N.L.R.B. at 1230-1231. *Sunland* thus illustrates that the Board's approach permits room for legitimate employer interests to prevail against a discrimination claim by a union organizer who applies for a job. The reasoning of the Eighth Circuit, by contrast, would resolve each and every case by denying the union organizer protection.

a nonunion employer, a paid union organizer cannot be "simultaneously loyal" to a union and to an employer, and thus is not an "employee" of that employer. App., *infra*, 8a. The court held that result to apply even to Hansen, whom respondents actually did hire. *Id.* at 9a. In the case of the unemployed union members (a group that included Hansen), the court asserted that they were under the Union's "control," and might have either participated in "an employee-initiated decision to engage in a work stoppage" at the Union's direction or resigned if directed to do so by the Union. *Id.* at 9a-10a. In the case of the two union officials, the court asserted that they would likewise have ignored the employer's mandates, might have either "increase[d] [their] organizational activities at [the] employer's expense" or quit work if directed to do so, and would have had a "reduced incentive to be * * * good employee[s]." *Id.* at 9a. Termination was a prospect that such a union official might "relish," the court stated, because it would permit the official to file an unfair labor practice charge. *Ibid.* In holding paid union organizers not to be "employees," the court thus permitted employers not to hire (and to fire) such paid union organizers solely on account of their union affiliation. The contrary result, the court suggested, would require employers "to place and retain on its payroll those whose continued presence on the job will be determined by an entity other than itself." *Id.* at 10a.

The court of appeals' analysis is flawed in four respects.

First, the court's bare assumption that paid union organizers will act in a disloyal manner toward their nonunion employers is belied by the Board's experi-

ence. The Board is aware of no evidence "that paid union organizers as a class have a significant, or indeed any, tendency to engage in * * * conduct" that is "inimical to the employer's legitimate interests." App., *infra*, 37a. Accordingly, "[t]he fact that paid union organizers intend to organize the employer's work force if hired establishes neither their unwillingness nor their inability to perform quality services for the employer." *Ibid*.

Second, in seeking to accommodate employers confronted with a genuinely disloyal employee, the court of appeals ignored the wide latitude that employers already have under the Act to respond to employee infractions and abuses. Section 8(a)(1) and (3) of the Act protects employees only from discipline based on union-related or other concerted activities. Nothing in the Act prohibits an employer with an irresponsible, underproductive, or uncooperative employee from taking appropriate disciplinary measures against that employee, including discharge, so long as those measures are neutrally imposed without regard to the employee's union affiliation or activity.

Indeed, "an employer may discharge an employee for a good reason, a poor reason or no reason at all so long as" the discharge is not motivated by unlawful considerations. *Edward G. Budd Manufacturing Co. v. NLRB*, 138 F.2d 86, 90-91 (3d Cir. 1943), cert. denied, 321 U.S. 778 (1944). See *Anthony Forest Products Co.*, 231 N.L.R.B. 976, 977-979 (1977) (no violation in discharge of paid union organizer for cause); *NLRB v. Henlopen Manufacturing Co.*, 599 F.2d 26, 29-30 (2d Cir. 1979) (same). Contrary to the court of appeals' suggestion, App., *infra*, 9a, termination of such an employee for just cause would not constitute an unfair labor practice.

But to the extent that the court of appeals viewed the increased organizational activities of a union-member employee as an instance of such misconduct, see *ibid.*, it erred. The Act protects such organizational activities so long as they are confined to non-work hours and do not otherwise interfere with production or discipline. See *Republic Aviation*, 324 U.S. at 803 n.10; *Texaco, Inc. v. NLRB*, 462 F.2d 812, 814 (3d Cir.) (employer may not insist that employees forgo organizational activities, or treat such activities as disloyalty), cert. denied, 409 U.S. 1008 (1972).

A third flaw in the court's holding that paid union organizers who apply to or actually work for an employer are not "employees" is its assumption that the employer otherwise would be "required" (App., *infra*, 10a) to hire such organizers without regard to their likely tenure. The court stated that, as a result of the Union's "job salting organizing resolution," an employer might be saddled with workers who would abruptly leave respondents' employ if directed to do so by the Union. *Id.* at 9a-10a.

However, as the Board has noted, an employer may validly guard against employee resignations of the sort feared by the court of appeals by refusing on a neutral basis to hire temporary workers. App., *infra*, 36a n.32. An employer may also validly ask an applicant whether there is any obstacle (including, *inter alia*, an agreement with another employer or a union) that could prevent that applicant from completing his job or serving for a given duration. The employer would be free not to hire a person so constrained, providing again that it applied this bar without regard to whether the source of the constraint was an agreement with the applicant's union. See *Willmar Electric Service, Inc.*, 303 N.L.R.B. 245, 246

n.2 (1991) (“[a]n employer may * * * lawfully refuse to hire a statutorily protected employee applicant, including a paid union organizer, on the basis of a *nondiscriminatory* policy against hiring any individual who, for example, seeks only temporary employment, applies while working for another employer, or intends to work simultaneously for more than one employer”), enforced, 968 F.2d 1327 (D.C. Cir. 1992), cert. denied, 113 S. Ct. 1252 (1993). The employer may also design its compensation scheme and other contractual terms so as to encourage longevity of employment. The need to protect employers against unsatisfactory employees, in short, may readily be met by other means short of depriving workers who are also paid union organizers of the coverage of the Act.

Finally, the decision below would create anomalies and frustrate important policies of the Act. Under that decision, a union member such as Hansen who is working for pay for an employer is not an “employee” entitled to protections against discrimination, but an as-yet unhired job applicant with no union affiliation is a statutory “employee.” See *Phelps Dodge Corp. v. NLRB*, *supra*. To deem such an on-the-job worker not to be an “employee” confounds the common understanding of that term. See *Black’s Law Dictionary* 525 (6th ed. 1990) (“employee” encompasses any “person in the service of another under any contract of hire * * * where the employer has the power or right to control and direct the employee in the material details of how the work is to be performed”). And because the sole basis for according the Act’s protections to the nonunion applicant but not to the union worker is that the worker has made a commitment to attempt to organize his em-

ployer’s work force and stands to receive supplemental income for doing so, the decision below is at odds with the “central purpose” of the Act—“the achievement and maintenance of workers’ self-organization.” *Phelps Dodge*, 313 U.S. at 193.

The decision below would have other anomalous results. A worker who has long satisfactorily performed his job may be discharged as a non-“employee” solely because the employer has learned that the worker has been engaged in paid organizational activity. Such a discharge would be inimical to “the Act’s avowed purpose of encouraging and protecting the collective-bargaining process.” *Sure-Tan*, 467 U.S. at 892. Indeed, in this case, respondents apparently did not even know at the time that they refused to hire the unemployed union members and at the time that Hansen was discharged that those union members and Hansen had a financial arrangement with the Union. To allow an employer successfully to interpose the defense that the employee was a paid union organizer, even if the employer has learned of that fact only after an unlawfully motivated discharge, is inconsistent with the antidiscrimination provisions of the Act. The decision below would also dictate, remarkably, that a longtime satisfactory worker would cease to become a protected “employee” within the meaning of Section 2(3) if during the course of his employment he took on the additional role of a paid union organizer—even if that added role did not adversely affect his work at all.

4. As the court of appeals acknowledged, App., *infra*, 5a-7a, the decision below conflicts with the decision of the District of Columbia Circuit in *Willmar Electric Service, Inc. v. NLRB*, *supra*, the decision of the Second Circuit in *NLRB v. Henlopen Manu-*

facturing Co., *supra*, and the decision of the Board that was enforced by the Third Circuit in *Escada (USA) Inc. v. NLRB*, 970 F.2d 898 (3d Cir. 1992) (Table).¹¹

a. In *Willmar Electric*, a union's field organizer applied for work as an electrician. He advised the employer that he intended to remain a union official and, during breaks and after hours, to attempt to organize the work force. He stated that he would "probably" stop receiving money from the union during his employment. The company did not hire him. An official explained that "it's kind of hard to hire you when you're out there on the other side, picketing." 968 F.2d at 1328.

Upholding findings of violations of Section 8(a)(1) and (3), the District of Columbia Circuit held that the Board had "reasonably determine[d] that [a person] who is employed simultaneously by a union and a company is an 'employee' under § 2(3) of the Act." 968 F.2d at 1330-1331. Congress, the court determined, had not "clearly resolved the issue" of whether the term "employee" in the Act encompasses paid union organizers. *Id.* at 1329 (citing *Chevron*, 467 U.S. at 842-843). But it was "plain" that the word "employee" did not exclude concurrent employment generally, and "[o]nce that (obvious)

¹¹ As the court of appeals also noted (App., *infra*, 5a-6a), its decision is in accord with decisions of the Fourth and Sixth Circuits. See *H.B. Zachry Co. v. NLRB*, 886 F.2d 70 (4th Cir. 1989); *NLRB v. Elias Brothers Big Boy, Inc.*, 327 F.2d 421 (6th Cir. 1964). The Fourth Circuit has recently reaffirmed its holding in *Zachry*. See *Ultrasystems Western Constructors, Inc. v. NLRB*, 18 F.3d 251, 254 (1994) (paid union organizer is "not a bona fide applicant for employment within the meaning of the NLRA").

step is taken, it is hard to see how one could exclude employment by a union as well as another employer except on grounds either of some implication from the structure of the Act or some powerful legislative history." *Ibid.* The court found no such evidence. On the contrary, it noted that under common law an employee could work for two masters so long as "the service to one does not involve abandonment of the service to the other." *Id.* at 1329-1330 (quoting Restatement, *supra*, § 226, at 498). And "[u]ntil such time as an employee 'abandons' the nonunion employer for the union employer, it is hard to see why he should be denied the protection of the Act." *Id.* at 1330.

The District of Columbia Circuit also rejected the central premise underlying both the decision below and the Fourth Circuit's decision in *H.B. Zachry Co. v. NLRB*, 886 F.2d 70 (1989), on which the court below relied: that hiring a union organizer "would subject [the employer] to intolerable risks of disloyalty." 968 F.2d at 1330 (citing *Zachry*, 886 F.2d at 73). The court noted that the "risk of disloyalty is surely not to be discounted," and that an employer may discipline or discharge an employee "for disloyalty," *ibid.* (citing *George A. Hormel & Co. v. NLRB*, 962 F.2d 1061, 1064 (D.C. Cir. 1992)), much as it could "for arson." *Ibid.* But, the court explained, the employer may not discharge such a person "by saying that arsonists are not 'employees'; it must prove that it would have fired the arsonist even if he hadn't been engaged in union-related activities." *Ibid.*

The Eighth Circuit's acknowledged disagreement with *Willmar Electric* is evident at every stage of analysis. While *Willmar Electric* found that the im-

plications of the statutory language as amplified by the common law made it "hard to see why [the union organizer] should be denied the protection of the Act," 968 F.2d at 1330, the Eighth Circuit found the statute to be of "little help," App., *infra*, 7a. Further, whereas *Willmar Electric* found a union organizer's joint employment insufficient to constitute "abandonment" under the common law, 968 F.2d at 1330, the Eighth Circuit found an "inherent conflict of interest," App., *infra*, 8a-9a. Finally, while the District of Columbia Circuit deferred under *Chevron* to the Board's determination that holding a union organizer an "employee" would not impair labor-management relations, the Eighth Circuit ignored the Board's analysis altogether and substituted its own appraisal of the impact in the workplace of such a holding. *Id.* at 8a-10a. The Eighth Circuit's approach therefore cannot be reconciled with the approach taken by either the Board or the District of Columbia Circuit.

b. In *Henlopen*, an applicant sought employment at a cosmetics-supply company without disclosing that she was a union organizer and was being paid \$50 a week by the union to organize the employer and to report information back to the union. 599 F.2d at 27-28. The employee was hired and later fired. The Second Circuit overturned the Board's findings of violations of Section 8(a)(1) and (3), because insufficient evidence of discriminatory conduct existed. 599 F.2d at 29-30. But in so doing, the court also rejected the company's claim that "a paid union infiltrator" is not a *bona fide* employee under the Act." *Id.* at 30. The court based its dictum on the Board's rulings that paid union organizers are in fact "employees" within the meaning of

Section 2(3) of the Act. *Ibid.* (citing *Anthony Forest Products Co.*, 231 N.L.R.B. 976 (1977); *Oak Apparel, Inc.*, 218 N.L.R.B. 701 (1975); *Dee Knitting Mills*, 214 N.L.R.B. 1041 (1974), enforced mem., 538 F.2d 312 (2d Cir. 1975) (Table) (No. 75-4016)).

c. In *Escada*, the Third Circuit summarily enforced an order of the Board finding the discharge of a paid union organizer to have been discriminatory. See 970 F.2d 898 (3d Cir. 1992), enforcing 304 N.L.R.B. 845 (1991). The Board there declined the invitation of the company and a dissenting Board member to adopt, based on the Fourth Circuit's decision in *Zachry*, a reading of Section 2(3) under which union employees would not be considered "employees" within the meaning of the Act. See 304 N.L.R.B. at 845, 846.¹²

d. While factual differences exist among the cases decided in the courts of appeals, as we read these cases, those differences were not decisive. Instead, each court, like the Board, adopted a broader rationale that paid union organizers as a rule either are, or are not, "employees" within the meaning of Section 2(3) of the Act.¹³ Moreover, to the extent that

¹² That dissenting Board member (Oviatt) later reconsidered his position in *Zachry*, and concurred in the Board's decision in the instant case. App., *infra*, 41a; see *Sunland*, 309 N.L.R.B. at 1231.

¹³ The "job salting organizing resolution" in this case, for example, is a factor present in no other decided case. The court of appeals cited that resolution as a "controlling" factor in the aspect of its decision holding that the unemployed union members were not "employees." App., *infra*, 10a. But it is apparent from the court's opinion that the Eighth Circuit would have reached the same result absent this resolu-

factual distinctions among paid union organizers may be seen as germane, this case involves union organizers in the varied contexts of a full-time union official, a member who is applying for a job, and a member (Hansen) actually hired by the employer. The existence of multiple fact patterns may assist the Court to resolve the issue in a conclusive manner that provides maximum guidance to the courts of appeals.

The discord in the circuits on the issue of whether a paid union organizer is an "employee" within the meaning of Section 2(3) of the Act is likely to persist absent this Court's intervention. The Board has already reexamined its position on that issue in light of an adverse decision (the Fourth Circuit's decision in *Zachry*). In this case and in a companion case, the Board reaffirmed its position. Thus, to the extent that the circuits have deferred to the Board's inter-

tion, for two reasons. First, the court endorsed the Fourth Circuit's reasoning in *Zachry*, a case that involved no such resolution. *Id.* at 7a. Second, in the aspect of its decision holding that the two union organizers were not "employees," the court did not indicate that it was relying on the resolution. *Id.* at 8a-9a. Indeed, the resolution did no more than put in writing the situation that generally exists for union members who work for nonunion employers. Union constitutions or bylaws, as in this case, see *id.* at 46a-47a, 62a, often call for disciplining or expelling members who work at nonunion jobs without the permission of the union. Thus, whether or not a resolution exists requiring a union member to leave a nonunion job upon the union's demand, a member whose union withdraws approval of his nonunion work will always have an economic incentive to leave that job, for if he does not leave that job, he may face a fine or loss of union benefits. Moreover, whether or not a resolution exists, the union member (such as the workers in this case who were unemployed prior to taking the nonunion job) is also free to conclude that it is worth his while to spurn the union's demand.

pretation of the term "employee," that interpretation is not likely to change. There is also no reason to believe that the circuits will gravitate towards a common position in light of the reasoning of sister circuits. It was after *Zachry* that the District of Columbia Circuit (in *Willmar Electric*) and the Third Circuit (in *Escada*) accepted the Board's view that paid union organizers are "employees," and it was after *Willmar Electric* and *Escada* that the court below adopted *Zachry*'s opposite view. The Fourth Circuit has recently reaffirmed its position in *Zachry*. See note 11, *supra*. The same issue is also presented in two other cases pending in the courts of appeals. See *Tualatin Electric, Inc. v. NLRB*, No. 93-70775 (9th Cir.); *Mathis Electric Co. v. NLRB*, No. 94-1948 (4th Cir.). The Board has advised us that the same issue is presented in more than 70 unfair labor practice cases presently pending before it.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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NOVEMBER 1994

APPENDIX A

**UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

No. 92-3911

TOWN & COUNTRY ELECTRIC, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT
INTERNATIONAL BROTHERHOOD OF ELECTRICAL
WORKERS, LOCAL 292, INTERVENOR/RESPONDENT

No. 93-1218

TOWN & COUNTRY ELECTRIC, INC.; AMERISTAFF
PERSONNEL CONTRACTORS, LTD., RESPONDENTS

v.

NATIONAL LABOR RELATIONS BOARD, PETITIONER
INTERNATIONAL BROTHERHOOD OF ELECTRICAL
WORKERS, LOCAL 292, INTERVENOR/PETITIONER

Petition for Review of an Order of the
National Labor Relations Board

Submitted: October 11, 1993

Filed: August 31, 1994

(1a)

Before RICHARD S. ARNOLD, Chief Judge,
WOLLMAN and LOKEN, Circuit Judges.

WOLLMAN, Circuit Judge.

The National Labor Relations Board found that Town & Country Electric, Inc. had violated sections 8(a)(1) and 8(a)(3) of the National Labor Relations Act (the "Act"), 28 U.S.C. §§ 158(a)(1) & (3), by discriminating against two full-time union organizers and nine other union members. Town & Country petitions for review of the Board's decision and order, and the Board cross petitions for enforcement of its order. Because we find that the union organizers and the other union members were not "employees" within the meaning of section 2(3) of the Act, 29 U.S.C. § 152(3), and therefore not entitled to the Act's protection, we deny enforcement of the order.

I.

In early September 1989, Town & Country, a large nonunion electrical contractor from Appleton, Wisconsin, obtained a contract to do electrical work at Boise Cascade's paper mill in International Falls, Minnesota. After being awarded the contract, Town & Country learned that Minnesota law requires electrical contractors to employ one electrician licensed by the State of Minnesota for every two unlicensed electricians working at a job site in the state. None of Town & Country's electricians had a Minnesota license. To help it recruit Minnesota-licensed electricians, Town & Country retained Ameristaff Personnel Contractors, Ltd., a temporary employment agency from Green Bay, Wisconsin. Ameristaff ad-

vertised in a Minneapolis newspaper for licensed journeymen electricians. Ameristaff prescreened those who responded to the advertisement and scheduled interviews for seven applicants at a Minneapolis hotel on September 7.

Ron Sager, Town & Country's human resources manager, Dennis Defferding, one of its project managers, and Steven Buelow, Ameristaff's president, flew from Appleton to Minneapolis to conduct the interviews. Due to inclement weather, they arrived at the hotel one and one-half hours late. Of the seven applicants with scheduled interviews, only one, Gary Weseman, was present. Also present for interviews, however, were approximately one dozen members of Local 292 of the International Brotherhood of Electrical Workers, including two full-time paid union officials. Officials of Local 292 had learned of the job advertisement and had encouraged union members to respond and, if hired, to organize the job site.

Sager and Defferding interviewed union member Craig Jones first because he said that he had to leave early. They then interviewed Weseman and offered him a job. Following these two interviews, Buelow informed Sager that none of the remaining applicants had prescheduled interviews and that from their applications they appeared to be union members. Sager then informed the applicants that he had decided to interview only applicants who had scheduled interviews because he had to return to Appleton to attend an important meeting that afternoon. When Sager asked all those without appointments to leave, Malcolm Hansen protested that he had called Ameristaff's office earlier that day and had been told to report to the hotel for an interview. After Buelow

had called his office and confirmed that Hansen had indeed called Ameristaff after they had left for Minneapolis, Sager interviewed Hansen. Sager hired Hansen, knowing that he was a union member. Although interviewed and selected by Town & Country, Hansen was technically employed by Ameristaff as a temporary employee for referral to Town & Country.

On September 12, Town & Country's crew, including Hansen, began work at Boise Cascade's mill. At the job site, Hansen announced to the crew that he was there to organize for the union. Hansen talked continuously to his coworkers about the benefits of the union and relentlessly solicited them to sign with the union, even though they indicated that they were not interested. Hansen's crewmates complained to their foreman about Hansen's nonstop talking as well as his poor workmanship and low productivity.

After the crew had begun work at the job site, Sager learned that under Minnesota law an electrical contractor could not use temporary employees from an employment agency; rather, all employees had to be directly employed by the contractor itself. Sager informed Buelow about this law and about Hansen's low productivity and poor workmanship; Buelow then discharged Hansen on September 14. Hansen asked Sager if Town & Country would hire him directly, but Sager refused to do so.

Affirming the Administrative Law Judge's decision, the Board found that Town & Country had violated sections 8(a)(1) and 8(a)(3) of the Act by refusing to interview two union officials and eight other union members because of their union affiliation and by refusing to retain Hansen because of his union activity at the job site. *Town & Country Elec.,*

Inc., 309 N.L.R.B. 1250 (1992). In so holding, the Board found that the two union organizers and the other union members, including Hansen, were employees within the meaning of section 2(3) of the Act. In its petition, Town & Country argues that this finding was improper.

II.

The Act "confers rights only on *employees*, not on unions or their nonemployee organizers." *Lechmere, Inc. v. NLRB*, 112 S. Ct. 841, 845 (1992). Applicants for employment, however, have long been considered to be employees under the Act. *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 181-88 (1941). Although the task of defining the term "employee" has been assigned primarily to the Board as the agency created by Congress to administer the Act, *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 891 (citing *NLRB v. Hearst Publications, Inc.*, 322 U.S. 111, 130 (1944)), the Board's construction of the term is not immune from judicial review, *Allied Chemical & Alkali Workers v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 166 (1971). We will uphold the Board's interpretation only if it is reasonable. *Sure-Tan*, 467 U.S. at 891; *Pittsburgh Plate Glass*, 404 U.S. at 166.

In this case, we must decide whether two separate but related classes of individuals were employees within the meaning of the Act. We first consider whether the two full-time union organizers were statutory employees and then decide the same issue for the other nine union members, including Hansen.

A.

The circuits are split on whether paid union organizers are employees under the Act. In *H.B. Zachry*

Co. v. NLRB, 886 F.2d 70, 72 (4th Cir. 1989), the Fourth Circuit, joining the Sixth Circuit, *NLRB v. Elias Brothers Big Boy, Inc.*, 327 F.2d 421, 427 (6th Cir. 1964), held that a union organizer is not a bona fide employee within the meaning of section 2(3). Zachry had refused to hire a paid full-time union organizer who had applied for work, upon the union's instruction, to organize Zachry's employees. Had the organizer been hired, he would have remained concurrently employed and supervised by the union. The union would have made up any shortfall in his salary, continued to make payments for his fringe benefits, and paid for his travel expenses and any other living expenses related to the job. In reaching its holding, the court stated that the "plain meaning of the term 'employee' contemplates an employee working under the direction of a single employer. The term plainly does not contemplate someone working for two different employers at the same time and for the same working hours." *Zachry*, 886 F.2d at 73.

On the other hand, in *Willmar Electric Service, Inc. v. NLRB*, 968 F.2d 1327, 1329-31 (D.C. Cir. 1992), *cert. denied*, 113 S. Ct. 1252 (1993), the D.C. Circuit, agreeing with the Second Circuit, *NLRB v. Henlopen Manufacturing Co.*, 599 F.2d 26, 30 (2d Cir. 1979), reached a contrary decision. *See also Escada (USA) Inc. v. NLRB*, 970 F.2d 898 (3d Cir. 1992) (enforcing the Board's order without an opinion). Willmar had refused to hire a job applicant who was employed by a union when he applied, sought the job for the purpose of organizing Willmar's work force, planned to retain an employment relationship with the union, and planned to return to being a full-time union employee. Rejecting

Zachry's holding, the court held that the Board could reasonably determine that an individual "who is employed simultaneously by a union and a company is an 'employee'" under section 2(3). *Willmar*, 968 F.2d at 1330-31.

The Fourth Circuit has recently adhered to its decision in *Zachry*, expressly declining to revisit it in the light of *Willmar*. *Ultrasystems Western Constructors, Inc. v. NLRB*, 18 F.3d 251, 255 (4th Cir. 1994).

We find *Zachry* to be more persuasive than *Willmar*. Section 2(3)'s definition of "employee,"¹ provides little help in deciding the issue before us. *See Nationwide Mutual Ins. Co. v. Darden*, 112 S. Ct. 1344, 1349 (1992); *Zachry*, 886 F.2d at 72. Section 2(3) merely defines employee to mean "any employee" and outlines several types of employment not covered by the statute. When a federal statute does not helpfully define the term "employee," we infer

¹ Section 2(3) provides in full: The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless this subchapter explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act, as amended from time to time, or by any other person who is not an employer as herein defined. 29 U.S.C. § 152(3).

that " 'Congress intended to describe the conventional master-servant relationship as understood by common-law agency doctrine.' " *Darden*, 112 S. Ct. at 1348 (quoting *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 740 (1989)).

Under common law, an agent has a duty to act solely for the benefit of his principal in all matters connected with his agency. Restatement (Second) of Agency § 387 (1957). More specifically, an agent is subject to a duty not to act on behalf of a person or entity whose interests conflict with those of the principal in matters in which the agent is employed. *Id.* § 394. Pursuant to this obligation, a person may be the servant of two masters at one time only if service to one does not involve abandonment of or conflict with service to the other. *Id.* § 226. Ordinarily, however, the control a master can properly exercise over the conduct of a servant prevents simultaneous service for two independent employers. *Id.* cmt a.

The Board argues that working simultaneously for the union as a paid organizer and for a nonunion employer does not involve a conflict of interest. The Board contends that the Act is founded on a belief that an employee may legitimately give allegiance to both a union and an employer.

Were this a case involving a typical job applicant, we might well agree that an employee may be simultaneously loyal to his union and to his nonunion employer. The two union organizers, however, were not typical applicants. They were not in search of a job; they already had one. The organizers wanted to enter Town & Country's work force not for financial gain, but to organize its workers. When a union offi-

cial applies for a position only to further the union's interests, we believe that an inherent conflict of interest exists. In this situation, the union official will follow the mandates of the union, not his new employer. If the union commands him to increase his organizational activities at his second employer's expense, he will do so. If the union asks him to quit working for his second employer, he will do so. Additionally, a union organizer in this position has a reduced incentive to be a good employee for his second employer. If he is terminated, he simply returns to his full-time union job. Indeed, he may even relish being discharged, because he then can file an unfair labor practice charge, claiming that he was terminated because of his organizing efforts. Accordingly, we find that the two full-time paid union organizers were not employees under the Act.

B.

We further find that the union members who applied, including Hansen, were not employees entitled to the Act's protection. Like the union organizers, these applicants were also under Local 292's control. Although not full-time organizers, they were encouraged by Local 292 to apply and to organize Town & Country's employees if hired. The union would pay those hired the difference between union scale and Town & Country's wages as well as their travel expenses.² Most important, these applicants were subject to Local 292's job salting organizing resolution. Pursuant to this resolution, Local 292 members

² Indeed, for Hansen's organizational efforts at the Boise Cascade job site, he received almost \$1100 from the union, as compared to \$725 from Ameristaff.

may work for nonunion employers only if they work for organizational purposes. In particular, the resolution provides that the union's business manager is "empowered to authorize members to seek employment by nonsignatory contractors for the purpose of organizing the unorganized." The resolution further provides that "such members, when employed by nonsignatory employers, shall promptly and diligently carry out their organizing assignments, and leave the employer or job immediately upon notification." We find this last provision controlling, for third-party control over a putative employee's job tenure, in contrast to, say, an employee-initiated decision to engage in a work stoppage, is inimical to, and inconsistent with, the employer-employee relationship. Fidelity to the principles and goals of one's chosen labor organization is to be expected and is of course protected by the Act. On the other hand, traditional common-law principles governing the establishment of the employer-employee relationship should not be jettisoned in an effort to broaden the protections of the Act beyond those which it was intended to provide. Town & Country may not deny employment to those who, in addition to performing the work they were employed to do, zealously seek to persuade their fellow employees to join their union, but it should not be required to place and retain on its payroll those whose continued presence on the job will be determined by an entity other than itself. Accordingly, we hold that Town & Country committed no unfair labor practice in refusing to interview the two union organizers and the other union members.

Having found that none of the alleged discriminatees were employees under the Act and that there-

fore no violations of the Act occurred, we need not consider Town & Country's remaining two arguments: that the Board improperly approved the ALJ's use of an irrebuttable presumption that all nonunion employers are unlawfully motivated to discriminate against individuals who are affiliated with a union, and that the Board failed to follow precedent that permits employers to prohibit solicitation during work time.

Enforcement of the order is denied.

A true copy.

Attest:

Clerk, U.S. Court of Appeals, Eighth Circuit.

APPENDIX B
BEFORE THE
NATIONAL LABOR RELATIONS BOARD

Cases 18-CA-11035, 18-CA-11044, and 18-CA-11080

TOWN & COUNTRY ELECTRIC, INC. and
 AMERISTAFF PERSONNEL CONTRACTORS, LTD.
and CHARLES EVANS

TOWN & COUNTRY ELECTRIC, INC. and
 AMERISTAFF PERSONNEL CONTRACTORS, LTD.
and INTERNATIONAL BROTHERHOOD OF
 ELECTRICAL WORKERS, LOCAL 292, AFL-CIO

TOWN & COUNTRY ELECTRIC, INC. *and*
 INTERNATIONAL BROTHERHOOD OF ELECTRICAL
 WORKERS, LOCAL UNION 343, AFL-CIO

December 16, 1992

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS
 DEVANEY, OVIATT, AND RAUDABAUGH

On September 18, 1990, Administrative Law Judge Joel A. Harmatz issued the attached decision. Respondent Town & Country Electric filed exceptions and a supporting brief; the General Counsel filed cross-exceptions, a supporting brief, and an answering brief to the Respondent's cross-exceptions; and Re-

spondent Town & Country Electric filed an answering brief to the General Counsel's cross-exceptions.

On January 22, 1992, the Board scheduled oral argument because this case raised important 8(a)(3) and (1) issues with respect to whether paid union organizers are "employees" within the meaning of the Act, if so, whether it violates the Act to refuse to hire a paid organizer.¹ Thereafter, the Respondent, the General Counsel, and the Charging Party Union, and, as amici curiae, the American Federation of Labor and Congress of Industrial Organizations and its Building and Construction Trades Department, AFL-CIO, the Chamber of Commerce of the United States of America, the Associated General Contractors of America, Inc., and the Associated Builders and Contractors Inc., presented oral argument before the Board. The Respondent and the amici also filed briefs.²

The Board has considered the decision and the record in light of the exceptions, briefs, and oral argument, and has decided to affirm the judge's rulings, findings,³ and conclusions and to adopt the rec-

¹ Oral argument additionally was held in *Sunland Construction Co.*, Cases 15-CA-10618-1 et al. and *Sunland Construction Co.*, Cases 15-CA-10927-2 et al.

² The Chamber of Commerce did not file a brief. Subsequently, the AFL-CIO submitted a letter citing a recently issued relevant court decision.

³ Respondent Town & Country Electric has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188

ommended Order as modified below.⁴

For the reasons discussed below, we find that paid union organizers Michael Priem and Greg Shafranski, as well as nine other union members who sought employment with the Respondent,⁵ are "employees" within the meaning of the Act. Thus, we agree with the judge that the Respondent violated Section 8(a) (3) and (1) of the Act by refusing to interview and consider for employment Priem, Shafranski, and eight other union members because of their union affiliation and by discharging employee Malcolm Hansen because of his union activities.⁶

F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

Respondent Town & Country Electric further contended that the judge was biased in that he prejudged the issues before him. Based on our review of the entire record, including the judge's decision, we conclude that the Respondent's contentions are without merit.

⁴ Although he found that Respondent Ameristaff Personnel Contractors, Ltd. coercively interrogated an applicant for employment, the judge concluded that the violation was adequately remedied by his recommended Order regarding Ameristaff's principal. Respondent Town & Country, which he found also violated Sec. 8(a) (1) of the Act by this conduct. We find merit in the General Counsel's exception to the judge's failure to require that Respondent Ameristaff, which was acting as the agent for Respondent Town & Country in the procurement of employees, also cease and desist from interrogating employees in violation of the Act. Accordingly, we shall order Respondent Ameristaff to cease and desist from such conduct and to post an appropriate notice.

⁵ The Union offered to pay these members the difference between union scale and the Respondent's wages and benefits if they would attempt to organize the Respondent's nonunion employees.

⁶ In adopting the judge's finding that Respondent Town & Country Electric violated Sec. 8(a) (3) of the Act by refusing

I. BACKGROUND

A. Facts

Town & Country Electric, Inc. (Town & Country) is the largest nonunion electrical contractor in the State of Wisconsin. In early September 1989,⁷ Boise Cascade awarded Town & Country a contract to perform electrical renovation work at Boise's facility in International Falls, Minnesota. Town & Country was to begin work on September 11. There is a Minnesota statutory requirement that an electrical contractor employ one electrician licensed by the State for every two unlicensed electricians engaged in such work on the jobsite. Town & Country did not have a single electrician licensed in Minnesota at the time Boise Cascade awarded it the contract.

To obtain electricians licensed in Minnesota, Town & Country retained Ameristaff, a temporary employment agency based in Minneapolis, for recruitment purposes. Under this arrangement, Ameristaff was responsible for advertising job opportunities related to the Boise-Cascade operation and assumed liability for fringe benefits earned by employees on its payroll who worked there. Town & Country, however, retained exclusive discretion regarding interviewing, hiring, the setting of wage rates and granting of increases, supervising and the discharge of employees on the Boise-Cascade project. The judge found, and we agree, that Town & Country exercised plenary

to retain employee Malcolm Hansen, we stress the evidence here that, as the judge found, the pivotal event leading to Town & Country's decision was Hansen's protected concerted activity in seeking to organize the unit employees during their lunch break on September 14, 1987.

⁷ All dates are in 1989 unless otherwise noted.

authority and control over employees retained by Ameristaff for its account and that, even absent a joint-employer relationship, Ameristaff was an agent whose conduct in connection with hiring for the Boise project was binding on Town & Country.

On September 3, Ameristaff ran an advertisement in a major Minneapolis newspaper announcing employment opportunities for "licensed journeymen electricians" and including its telephone number. Ron Sager, Town and Country's manager of human resources, made it clear to Ameristaff before the advertisement was placed that job applicants had to be "able to work a merit [nonunion] shop." When applicants responded to the advertisement, Ameristaff's receptionist, Lorrie Ann O'Mellan, asked them whether they preferred to work union or nonunion and, if the job seeker had worked only union projects, whether the person would work nonunion.⁸ Steven Buelow, Ameristaff's president, arranged for Town & Country to interview applicants at the Embassy Suites in Minneapolis on September 7.

Members and officials of International Brotherhood of Electrical Workers, Locals 292 and 343, learned of Ameristaff's job advertisements. The Unions, which had authorized their members to work nonunion for organizational purposes, encouraged unemployed members to apply and, if hired, to organize the jobsite. There was a fund the Unions had established to reimburse members for wage, travel, and health benefit differentials they incurred on nonunion jobs.

⁸ The General Counsel did not allege that O'Mellan's questioning of the phone applicants violated Sec. 8(a)(1) of the Act.

On September 7, Sager and Dennis Defferding, the Respondent's project manager, traveled from Appleton, Wisconsin to Minneapolis to conduct job interviews for the Boise-Cascade project. They did not arrive at the Embassy Suites until about 11 a.m. because their flight had been delayed for several hours by adverse weather conditions. When they arrived, there were about a dozen unemployed members of IBEW Local 292, including Priem and Shafranski, waiting to interview. None had previously scheduled interviews, except for Malcolm Hansen who had called Ameristaff that morning and was told by O'Mellan to report for an interview at the Embassy Suites. The only other applicant appearing for an interview, Gary Weseman, was not a union member and had previously scheduled an interview through Ameristaff. Buelow distributed applications, under the Ameristaff logo, to all the applicants.

Town & Country began the interviews with Craig Jones, a union member who had no appointment, apparently because Jones said that he had to leave soon to care for his children. During the interview, Jones characterized Town and Country's starting rate of \$15 per hour as an insult. Jones also told the Town & Country representatives that he would have to discuss out-of-town work with his wife. Town & Country told Jones that it would keep his application on file. There was no further contact between Jones and Town & Country representatives.⁹ Town & Country

⁹ We adopt the judge's finding that the Respondent did not violate Sec. 8(a)(3) by refusing to consider Jones for employment, or another union member, Roger Chartrand, who arrived at the Embassy Suites as the Respondent's representatives were departing.

next interviewed Gary Weseman but did not hire him.¹⁰

Meanwhile, Buelow informed the remaining applicants that the job was nonunion. The union members responded that they were interested in any work available. Buelow left the room and, about 15 minutes later, returned and read off a list of seven names. None were present. After identifying that group of names as those applicants with prearranged appointments, Buelow said that he did not know if anyone without an appointment would be interviewed. Priem, one of the two paid union organizers, told Buelow that there were at least eight licensed journeymen present who could take the place of those applicants who had failed to appear.

After Town & Country interviewed Jones and Weseman, Buelow reported to Sager that none of the other applicants had appointments. Sager expressed curiosity as to how those applicants without appointments had known about the interviews. Buelow at some point showed him several of the applications and commented, "I think they're union." Sager decided to cancel further interviews and return to Appleton purportedly because his attendance was required for a manpower meeting at 3:30 that afternoon. Yet, Sager admitted that he had previously learned, on September 5, of the licensed journeyman/helper ratio that Minnesota law requires. It is undisputed that Town & Country employed no electricians licensed in Minnesota at the time Sager decided to return to Appleton.

When Sager announced to the remaining applicants that he would conduct no further interviews, Hansen

¹⁰ The General Counsel did not allege that Town & Country's failure to hire Weseman constituted a violation.

protested that he had called the number in the newspaper advertisement and was told to "show up." Hansen announced that he would not leave until Sager interviewed him. After threatening to call local authorities and have the union members removed from the hotel room, Sager said that he would check about Hansen's situation and "honor the commitment" if Hansen had made an appointment. Buelow confirmed that Hansen had called Ameristaff so Sager interviewed him. Sager then announced to the other applicants that he would not interview anybody else.

Town & Country conducted several interviews with Hansen before deciding to hire him. On September 14, 2 days after Hansen began work, the Respondent discharged Hansen because, as the judge found, he attempted to organize the Respondent's nonunion employees working at the jobsite.

B. *Judge's Findings*

The judge found that, considering Town & Country's dire need at the time for electricians who were licensed in Minnesota and the evidence that Town & Country aborted the Embassy Suites interviews immediately after learning of the remaining applicants' union affiliation, the General Counsel established a prima facie case that Town & Country had discriminatorily refused to consider these applicants for hire notwithstanding its subsequent hire of Hansen.

In considering Town & Country's defenses, the judge rejected its contention that Sager did not want to interview anyone whom Ameristaff had not pre-screened. The judge stressed that Town & Country had interviewed Jones without this condition being met and that Sager, who should have known that

Ameristaff had screened only seven applicants, expressed pleasure on arriving at the Embassy Suites and observing that the turnout was larger than anticipated. The judge found it incomprehensible that, given Sager's purported urgency about attending the manpower meeting later that day, Sager made no effort on his arrival at the Embassy Suites to monitor the interviewing process so as to best utilize the limited time he claimed was available for the interviews. For these reasons, the judge found that, except for Jones and Chartrand, discussed supra, Town & Country violated Section 8(a)(3) by failing to demonstrate that it would not have interviewed and considered for hire those named in the complaint in the absence of their union affiliation.

Regarding Hansen's discharge, the judge concluded that Town & Country had failed to substantiate by credible evidence that it would have discharged Hansen even in the absence of his organizational activity. The judge distinguished the Fourth Circuit's decision in *H. B. Zachry Co. v. NLRB*, 886 F.2d 70 (1989), denying enf. to 289 NLRB 838 (1988), discussed infra, from the present case because, in his view, the evidence showing that the Union planned to reimburse Hansen for any wage and benefit losses he incurred on the nonunion job did not warrant a finding that Hansen was a paid union organizer.

C. *Exceptions*

Based on the court's decision in *Zachry*, supra, the Respondent argues in its exceptions that the discriminatees were not bona fide applicants under the statute. The Respondent notes that Priem and Shafrenski were full-time salaried business representa-

tives and that the Union paid Hansen full journeyman's scale, in addition to the pay he received from Ameristaff, for the 31 hours that he worked at the Respondent's jobsite. The Respondent claims that the Union's payments to Hansen put him in the same category as full-time salaried business agents whom the court excluded from the definition of employee under Section 2(3). Regarding the rest of the alleged discriminatees, the Respondent argues that no violation occurred when it rejected their applications because, if they had been hired, the Union's "salting resolution" would have paid them the difference between the Respondent's wages and union scale and thus disqualified them under *Zachry*.

The Respondent also contends that the alleged discriminatees did not qualify as statutory employees because their first obligation under the salting resolution was to fulfill the Union's organizing purpose. The Respondent asserts that it was the Union which was the discriminatees' employer in the circumstances here. According to the Respondent, these union members would only work for it under the Union's direction and, in the process, they would interfere with the self-determination rights of its other employees. Further, because the salting resolution required members to leave the nonunion jobsite once organizing had ceased, the Respondent argues that none of the alleged discriminatees met the statutory definition of employee because they were not seeking permanent employment. Thus, for the above reasons, the Respondent urges the Board to find that the applicants for employment whom it rejected and Hansen were not employees under Section 2(3) of the Act.

II. ANALYSIS

A. Overview

We agree, for the reasons stated by the judge, that the Respondent violated Section 8(a)(3) and (1) by refusing to hire Priem, Shafranski, and eight other union members who applied for work and by later discharging employee Malcolm Hansen because of his union activities. Additionally, in finding these 8(a)(3) violations, we specifically affirm the judge's findings that Hansen, as well as the discriminatees that Town & Country rejected for employment because of their union affiliation, are statutory employees for the reasons fully discussed below.

B. Paid Union Organizers as "Employees" Within the Meaning of Section 2(3)

1. The definition of "employee"

We begin our analysis recognizing that applicants are "employees." *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177 (1941). As applicants are "employees," the question is whether paid union organizer applicants are employees.

Congress, in 1935, broadly defined "employee" in Section 2(3), providing that:

The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment

The word "employee" both in common usage and in the law ordinarily includes individuals concurrently working for different employers. "Employee" commonly refers to individuals "employed by another," "under wages or salary,"¹¹ without reference to any requirement that they be employed by only a single employer. Similarly, a standard legal definition of "employee" encompasses any "person in the service of another under any contract of hire, express or implied, oral or written, where the employer has the power or right to control the employee in the material details of how the work is to be performed," without reference to, or proscription of, dual employment. *Black's Law Dictionary* 471 (rev. 5th ed. 1979). As long as union organizers employed by or seeking work with an employer do so for wages in return for assigned work, they meet the standard dictionary definition of "employee." Giving Section 2(3), as amended, its "ordinary meaning,"¹² we find that the definition of "employee" as "any employee" is sufficiently expansive to encompass paid union organizers.

2. Exclusions

Next we look to the exclusions in Section 2(3). Congress in 1935 excluded specific categories from its broad definition of "employee," i.e., agricultural laborers and individuals performing domestic service in

¹¹ *Websters Third New International Dictionary*, 743 (rev. 1971). See also *Funk & Wagnalls Standard College Dictionary*, 433 (1973), which defines "employee" as "one who works for another in return for salary, wages, or other consideration."

¹² We assume that the statutory purpose is expressed by the ordinary meaning of its words. *INS v. Phinpathya*, 464 U.S. 183, 189 (1984).

the home. In 1947, Congress added to the exclusions so that the 2(3) definition of "employee" now excludes:

any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act, as amended from time to time, or by any other person who is not an employer as herein defined.

"Paid union organizers" do not appear in these exclusions. Under the well-settled principle of statutory construction—*expressio unius est exclusio alterius*—only these enumerated classifications are excluded from the definition of "employee."¹³ Accordingly, full-time, paid union organizers are "employees" within the ordinary meaning of this provision. See generally *State Bank of India v. NLRB*, 808 F.2d 526, 531-532 (7th Cir. 1986), cert. denied 483 U.S. 1005 (1987).

3. Legislative History

We must also look to the legislative history, however, because a statute will not be given its ordinary meaning if there is "a clearly expressed legislative intention to the contrary." *Consumer Product Safety Commission v. GTE Sylvania*, 447 U.S. 102, 108 (1980). There is no evidence in the legislative history

¹³ 2A Singer, *Sutherland Statutory Construction*, Sec. 47.23 (4th ed. 1973) (Suppl. 1991).

that Congress intended Section 2(3), at least as to paid union organizers, to be more restrictive than the ordinary meaning of its terms.¹⁴ On the contrary, the legislative history reflects Congress' intent to expansively interpret "employee."

Although Congress did not specifically consider the status of union organizers when enacting Section 2(3), it expansively referred to "employees" as "workers," "wage earners," "workmen,"¹⁵ and "every man on the payroll."¹⁶ Even when Congress amended Section 2(3) in 1947 specifically to exclude additional classifications from the definition of "employee," it did not narrow the general definition of "employee." Rather, Congress continued to describe "employees" inclusively as individuals "work[ing] for another for hire," and "work[ing] for wages and salaries under direct supervision."¹⁷

Further, Congress reassessed and rebalanced the right of an employer to require undivided loyalty from some of its workers with respect to labor unions by its 1947 amendment of Section 2(3) excluding "supervisors" from the definition of "employee."¹⁸

¹⁴ Compare *NLRB v. Bell Aerospace Co.*, 416 U.S. 267 (1974) (based on legislative history of the Taft-Hartley Act, managerial employees are not covered by Act, although not explicitly excluded from Sec. 2(3)).

¹⁵ H.R. Rep. No. 969, 74th Cong., 2 Leg. Hist. 2917-2918 (NLRA 1935).

¹⁶ 2 Leg. Hist. 3119, 3220 (NLRA 1935).

¹⁷ H.R. Rep. No. 245, 80th Cong., 1st Sess., 1 Leg. Hist. 309 (LMRA 1947).

¹⁸ See *Florida Power & Light v. Electrical Workers Local 2164*, 417 U.S. 790, 807-811 (1974).

Had Congress concluded that paid organizers were not entitled to the protection afforded "employees" by the statute, it knew how to exclude them. It did not.

Under the broad terms employed by Congress when enacting and amending Section 2(3), paid organizers applying for work, or hired to work for wages under the employer's direct supervision, meet the requirements for statutory "employee" status.

4. Interpretations of Section 2(3)

a. *The Supreme Court*

Consistent with the inclusive language of Section 2(3), and Congress' expressed intent to expansively define "employee," the Supreme Court has consistently interpreted Section 2(3) broadly to cover individuals not explicitly excluded. The seminal case is *Phelps Dodge Corp. v. NLRB*, supra, where the Supreme Court broadly interpreted the Act to include applicants for work as well as actual hires. The Court also rejected *Phelps Dodge's* argument that certain strikers who had obtained employment elsewhere were not entitled to reinstatement because they were not statutory "employees." Writing for the Court, Justice Frankfurter twice characterized the definition of "employee" in Section 2(3) as a "broad" one, which "expressed the conviction of Congress 'that disputes may arise regardless of whether the disputants stand in the proximate relation of employer and employee . . .'" Id. at 192 (quoting from H. R. Rep. No. 1147, 74th Cong., 1st Sess, p. 9). In these situations, emphasized Justice Frankfurter, "to deny the Board power to wipe out the prior discrimination . . . would sanction a most effective way of defeating the right of self-organization." Id. at 193.

Following Congress' 1947 amendment of Section 2(3) to exclude supervisors, independent contractors, and others, the Supreme Court reaffirmed an expansive interpretation of "employee." In *Chemical Workers v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 166-168 (1971), the Supreme Court held that "employee" under Section 2(3) broadly covers those who work for another for hire, although not those who have retired. Similarly, in *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 891 (1984), the Court said that the "breadth of 2(3)'s definition is striking: the Act squarely applies to 'any employee.' The only limitations are specific exemptions" contained in the statute. In concluding that undocumented aliens were statutory "employees," the Court relied not only on Section 2(3)'s broad language, but also on the conclusion that an expansive interpretation of the statute was consistent with "the Act's avowed purpose of encouraging and protecting the collective-bargaining process." Id. at 892.

The Supreme Court's analysis of the word "employee" under the Employee Retirement Income Security Act (ERISA), a statute that also addresses work place issues, endorses the application of common law agency principles. Thus, in *Nationwide Mutual Insurance Co. v. Darden*, 112 S.Ct. 1344, 1349 (1992), the Supreme Court, finding that "employee" under ERISA was ill defined, turned to the common law, quoting *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 739-740 (1989):

[W]hen Congress has used the term "employee" without defining it, we have concluded that Congress intended to describe the conventional mas-

ter-servant relationship as understood by common law agency doctrine.

Only where employing traditional agency principles would thwart congressional intent or produce absurd results will the Court refuse to apply those principles. *Nationwide Mutual Insurance Co. v. Darden*, supra, 112 S.Ct. at 1349.

Under common law agency principles:

A person may be the servant of two masters, not joint employers, at one time as to one act, if the service to one does not involve abandonment of the service to the other. *Restatement (Second) of Agency*, Section 226, pp. 498-500 (1957).¹⁹

NLRA Section 2(3), like its ERISA counterpart, circuitously defines "employee" as "any employee." There being no contrary congressional intent, we find no bar to applying common law agency principles to the determination whether a paid union organizer is an "employee." Under those principles, paid union organizers cannot be excluded from the definition of "employee" on the basis that they are paid by their union as well as by the employer they are attempting to organize.²⁰

¹⁹ See also *Kelley v. Southern Pacific Co.*, 419 U.S. 318, 324 (1974); *Dellums v. Powell*, 566 F.2d 216, 222 and fn. 22 (D.C. Cir. 1977), cert. denied, 438 U.S. 916 (1978); *Beaver v. Jacuzzi Bros.*, 454 F.2d 284, 285 (8th Cir. 1972); *Mazer v. Lipshutz*, 360 F.2d 275, 278 (3d Cir. 1965), cert. denied, 385 U.S. 833 (1966).

²⁰ This position recently was endorsed by the District of Columbia Court of Appeals in *Willmar Electric Service v. NLRB*, 968 F.2d 1327 (D.C. Cir. 1992).

In sum, Supreme Court decisions support a reading of Section 2(3) that includes paid union organizers within the definition of employee.

b. *The Board*

Courts repeatedly have held that the task of determining "the contours of the term 'employee' properly belongs to the Board." *Chemical Workers v. Pittsburgh Plate Glass*, supra, 404 U.S. at 167.²¹ When undertaking this task, the Board has uniformly interpreted "employee" in the "broad generic sense" to "include members of the working class generally."²² Under this expansive interpretation, the Board has found that Section 2(3) covers not only employees of a particular employer, but also employees of another employer, former employees of a particular employer, applicants for work, temporary and part-time employees, and individuals attending school or working a second job.²³

In accord with its broad interpretation of Section 2(3), the Board historically has held that paid union organizers are "employees" entitled to the Act's protections. Thus, in *Dee Knitting Mills*, 214 NLRB

²¹ See also *Sure-Tan, Inc. v. NLRB*, supra, 467 U.S. at 891; *Bayside Enterprises v. NLRB*, 429 U.S. 298, 304 (1977); *NLRB v. Hearst Publications*, 322 U.S. 111 at 130 (1944); *Iron Workers v. Perko*, 373 U.S. 701, 706 (1963).

²² *Briggs Mfg. Co.*, 75 NLRB 569, 570 (1947); *Oak Apparel*, 218 NLRB 701 (1975). See also *Consolidation Co.*, 266 NLRB 670, 674 (1983); *Giant Food Markets*, 241 NLRB 727, 728 fn. 3 (1979); *Little Rock Crate & Basket Co.*, 227 NLRB 1406 (1977).

²³ *Briggs Mfg. Co.*, supra, 75 NLRB at 570; *Little Rock Crate & Basket Co.*, supra; *Oak Apparel*, supra, 218 NLRB at 707; *L. D. Brinkman Southeast*, 261 NLRB 204, 210 (1984).

1041 (1974), enfd. mem. 538 F.2d 312 (2d Cir. 1975), the Board held that "an employee does not lose his status because he is also paid to organize." Id. In *Oak Apparel*, supra, the Board adopted the administrative law judge's conclusion that:

The definition in the Act provides that "the term 'employee' shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise. . . ." While the definition expressly excludes particular kinds of employees, [paid union organizers] would not fall into any of these excluded categories. In accord with the broad application given to this definition, the Board and the courts find generally that individuals who are hired by, work under the control of, and receive compensation from, an employer, are employees of that employer and entitled to the protection of the Act, including cases where they were employed on a part-time or temporary basis; were attending school; were working on a second job; or in other circumstances which indicated they intended to remain on a particular job for a limited time. [Footnote omitted.]

The Board in *Oak Apparel* rejected the argument that the discharged union organizers were not "employees" because they did not intend to remain in the respondent's employ beyond the period required for organization.²⁴ The Board found it immaterial for

²⁴ The Board also rejected the contention that the paid organizers in *Oak Apparel* were not employees because the union directed their organizational activities and controlled their employment through compensation.

purposes of Section 8(a)(3) whether the discharged organizers sought permanent employment with the respondent. Permanency of employment, the Board held, was relevant for election purposes, but was unrelated to the issue of "employee" status. Id. at 701, citing *Phelps Dodge Corp. v. NLRB*, supra, 313 U.S. at 192; *Dee Knitting Mills*, supra. To hold otherwise, concluded the Board, would result in employers discriminating "with impunity against temporary or casual employees who are not includable in any bargaining unit." Id. Since *Oak Apparel*, the Board consistently has held that paid union organizers are statutory employees entitled to the Act's protection.²⁵

c. *The courts of appeals*

The Second, Third, and District of Columbia Circuit Courts of Appeals agree with the Board that a paid union organizer can nonetheless be an "employee" under the Act. See *NLRB v. Henlopen Mfg.*, 599 F.2d 26, 30 (2d Cir. 1979) (dictum);²⁶ *Escada (USA), Inc. v. NLRB*, 140 LRRM 2872 (3d Cir. 1992), enfg. mem. 304 NLRB 845 (1991); *Willmar Electric Service v. NLRB*, 968 F.2d 1327 (D.C. Cir. 1992). Two courts of appeals disagree with the Board. See *NLRB v. Elias Bros. Big Boy*, 327 F.2d

²⁵ *Anthony Forest Products*, 231 NLRB 976, 977-978 (1977); *Lyndale Mfg. Corp.*, 238 NLRB 1281, 1283 fn. 3 (1978); *Margaret Anzalone, Inc.*, 242 NLRB 879, 888 (1979); *Palby Lingerie, Inc.*, 252 NLRB 176, 182 (1980); *Pilliod of Mississippi*, 275 NLRB 799, 811 (1985); *Multimatic Products*, 288 NLRB 1279, 1313 fn. 226, 1316 (1988).

²⁶ The Second Circuit refused to enforce the Board's order on other grounds, however.

421, 427 (6th Cir. 1964); *H. B. Zachry Co. v. NLRB*, 886 F.2d 70 (4th Cir. 1989).

5. Reexamination of our interpretation of Section 2(3)

On reexamination of our analysis of the scope of Section 2(3) in *Oak Apparel* and its progeny, we conclude that the definition of "employee" encompasses paid union organizers.

As more fully explained above, we rely on: (1) the language of Section 2(3) which, given its ordinary meaning and Congress' determination not to place paid union organizers among its other exclusions, must be read inclusively to encompass paid organizers; (2) the Supreme Court's consistently broad interpretation of Section 2(3) and its application of common law agency principles to find that an individual cannot be excluded from the definition of "employee" on the basis that he is being paid by two employers; (3) the reasoning found in our own precedents, most recently approved by the District of Columbia Circuit in *Willmar Electric Service*, supra, that, among other things, rejects the position that because the employment of paid union organizers is of limited duration they cannot be "employees."

The Respondent and its amici rely on the Fourth Circuit's reasoning in *H. B. Zachry v. NLRB*, supra. The court held that it would distort the "ordinary meaning" of "employee" to include within the 2(3) definition someone who was employed and directed in his organizing efforts by the union and who would continue to receive wages and benefits from the union while he was also employed by the employer being organized (citing *Chemical Workers v. Pittsburgh Plate*

Glass, supra, 404 U.S. at 167-168). *H.B. Zachry v. NLRB*, supra, 886 F.2d at 73.

The District of Columbia Circuit in *Willmar Electric Service v. NLRB*, supra, recently addressed this point. The court applied common law agency principles to interpret Section 2(3) to include concurrently employed paid union organizers.²⁷ Observing that a paid organizer's employment would give him a better perch from which to propagandize, the *Willmar* court nonetheless found that this was inadequate to distinguish the paid organizer from an unpaid union zealot, who was plainly an "employee." We agree and conclude that union organizers are "employees."²⁸

C. Policy Considerations

We next consider whether protecting paid union organizers as "employees" furthers the policies of the National Labor Relations Act.

The right to organize is at the core of the purpose for which the statute was enacted.²⁹ No coherent pol-

²⁷ The court cited *Nationwide Mutual Insurance Co. v. Darden*, supra, 112 S.Ct. at 1344, in support of its application of common law agency principles. *Id.* at 1329.

²⁸ In our view, the Respondent's restrictive definition of "employee" to exclude those working for two employers at the same time draws little support from its citation to *Chemical Workers v. Pittsburgh Plate Glass*, supra. There the Supreme Court held that the statutory language must be given its "ordinary meaning;" nothing in that decision points to a conclusion that dual-employed individuals fall outside the ordinary meaning of "employee." On the contrary, the Supreme Court expansively interpreted "employee" in *Pittsburgh Plate Glass* to include anyone working for another for hire.

²⁹ *NLRB v. Hearst Publications*, supra at 126 (1944); *Phelps Dodge Corp. v. NLRB*, supra, 313 U.S. at 193 ("the

icy considerations to the contrary have been advanced that do not, on analysis, resolve themselves into arguments that employers be permitted to discriminate based on an individual's presumed or avowed intention to join or assist a labor organization.³⁰

We find no conflict between protecting paid union organizers as employees and legitimate managerial rights:

Protection of the workers' right to self-organization does not curtail the appropriate sphere of managerial freedom; it furthers the wholesome conduct of the business enterprise. *Phelps Dodge Corp. v. NLRB*, supra, 313 U.S. at 182.

While working for the employer, the paid organizer is subject to its discretion and control, and is responsible for performing assigned work. The organizer's activities, like those of any employee, may be limited pursuant to lawful no-solicitation rules. *Republic Aviation Corp. v. NLRB*, supra, 324 U.S. at 802-803 fn. 10. Outside work time, however, the organizer—like other workers—is free to solicit for the union. *Id.* The fact that a paid organizer may approach his non-work time organizing activities with greater vigor than an unpaid union adherent is not an acceptable basis for denying the organizer statutory protections.

central purpose of the Act [is] directed . . . toward the achievement and maintenance of workers' self-organization"); *Republic Aviation v. NLRB*, 324 U.S. 793, 797 (1945).

³⁰ Paid organizers are not employees because they fulfill the important function of providing coworkers with information on their rights to self-organization. Having concluded that paid organizers are employees, however, their employment furthers this fundamental policy of the Act.

The Respondent and its amici also contend that finding that an organizer is an "employee" within the ambit of Section 2(3) would impinge on the employees self-determination rights because the union organizer would be paid by the union to vote for it in an election.

The organizer's status as a statutory employee does not, however, ensure his right to vote.³¹ In determining whether statutory "employees" are eligible to vote, the Board applies a traditional "community of interest" test. *Multimatic Products*, supra, 288 NLRB at 1316. Under this test,³² paid union organizers fre-

³¹ Note, *H. B. Zachry Co. v. NLRB: Paid Full-Time Union Organizer Not an "Employee,"* 50 La. L. Rev. 1211, 1217 (1990). The Board is free to exclude statutory employees from bargaining units who are otherwise protected by the Act. *NLRB v. Action Automotive*, 469 U.S. 490, 498 (1985). See generally *NLRB v. Hendricks County Rural Electric Corp.*, 454 U.S. 170, 190 (1981). As stated in *Oak Apparel*, supra, 218 NLRB at 701:

The distinction between an employee's status with respect to the appropriate unit and his or her status as an "employee" within the meaning of Section 2(3) has been recognized since the infancy of the administration of the Act.

³² Paid union organizers do not, however, forfeit their status as "employees" because they do not intend to retain their employment beyond the duration of an organizing campaign. Although the permanency of employment is relevant to the issue of voter eligibility, it is irrelevant to "employee" status. *Oak Apparel*, 218 NLRB at 701. It is well settled that temporary employees are within the ambit of Sec. 2(3) and are entitled to the Act's protections. See, e.g., *Pennsylvania Electric Co.*, 289 NLRB 1200 (1988); *EDP Medical Computer System*, 284 NLRB 1232 (1987). To hold otherwise, and single out paid union organizers for exclusion from 2(3)

quently are excluded from voting, either as "temporary" employees, or because their interests sufficiently differ from those of their coworkers.³³ In short, employee status is not synonymous with voter eligibility. *Willmar*, supra at 1330. Accordingly, any concern over unions packing bargaining units with their paid functionaries is, in our experience and judgment, misplaced.

Next, the Respondent relies on the Fourth Circuit's determination that our approach does not sufficiently account for the adversary relationship between employer and union. The circuit relied on the Supreme Court's decision in *NLRB v. Babcock & Wilcox*, supra, among other things, as supported for this view.

Our determination that paid union organizers are "employees" is, however, completely consistent with the philosophy of *NLRB v. Babcock & Wilcox Co.*, supra. *Babcock & Wilcox*, as recently reaffirmed by the Supreme Court in *Lechmere, Inc. v. NLRB*, 112 S.Ct. 841 (1992), balances the property rights of employers against the Section 7 rights of employees to learn about self-organization from nonemployees. This balancing process, however, is inapplicable to 2(3) employees. Neither *Babcock & Wilcox* nor *Lechmere* interpret Section 2(3), or so much as hint that property rights may be resurrected as a device

coverage as "temporaries" flies in the face of Sec. 7 protections. Of course, employers may lawfully refuse to hire individuals seeking temporary employment, where the refusal is based on neutral hiring policies, uniformly applied. *Willmar Electric Service*, supra, 303 NLRB 245, 246 fn. 2.

³³ *Oak Apparel*, supra, 218 NLRB at 701; *Dee Knitting Mills*, supra, 214 NLRB at 1041; *299 Lincoln Street, Inc.*, 292 NLRB 172, 180 (1988).

to bar activity long protected by the statute.³⁴ Instead, they address the lawful restrictions that employers can place on nonemployees. See *Willmar* at 1330.

The Respondent and its amici vigorously contend that paid union organizers will engage in union activities to the detriment of work assigned by the employer or will embark on acts inimical to the employer's legitimate interests. We do not agree. The statute's premise is at war with the idea that loyalty to a union is incompatible with an employee's duty to the employer. The fact that paid union organizers intend to organize the employer's work force if hired establishes neither their unwillingness nor their inability to perform quality services for the employer. Indeed, because the organizers seek access to the job-site for organizational purposes, engaging in conduct warranting discharge would be antithetical to their objective. No body of evidence has been presented that would support any generalized, or specific, finding that paid union organizers as a class have a significant, or indeed any, tendency to engage in such conduct.

³⁴ Amici argue that paid union organizers are not "employees" because their request for employment is a guise to gain access to the employer's private property to further the union's objectives. Although gaining such access likely will facilitate the paid organizer's union activities, as long as the organizer is able, available, and fully intends to work for the employer if hired, he will not be disqualified from "employee" status. Further, a paid union organizer employee arguably poses no greater threat to an employer's property rights than a prounion employee who voluntarily engages in organizational activity. Note *H. B. Zachry Co. v. NLRB: Paid Full-Time Union Organizer Not an "Employee,"* 50 La. L. Rev. 1211, 1215-1216 (1990).

The statute is founded on the belief that an employee may legitimately give allegiance to both a union and an employer. To the extent that may appear to give rise to a conflict, it is a conflict that was resolved by Congress long since in favor of the right of employees to organize. To hold otherwise at this late date would require "some type of transcendent loyalty" on the part of an "employee" to the employer that, in theory, even the Fourth Circuit would not require. *Zachary*, supra, 886 F.2d at 73.³⁵

Our decisions finding that union organizers are not meaningfully distinguishable from other "employees" under the statute should not be read, however, to give paid union organizers carte blanche in the workplace. If the organizer violates valid work rules, or fails to perform adequately, the organizer lawfully may be subjected to the same nondiscriminatory discipline as any other employee. See *Wellington Mfg. v. NLRB*, 330 F.2d 579 (4th Cir. 1964), cert. denied, 379 U.S. 882 (1964); *Sears, Roebuck & Co.*, 170 NLRB 533 (1968). In the absence of objective evidence, however, we will not infer a disabling conflict or presume that, if hired, paid union organizers will engage in activities inimical to the employer's operations. Thus,

³⁵ Although employers lawfully may insist that employees adequately perform assigned work, they cannot insist that employees forego organizing activities, or treat those activities as disloyalty. *Texaco, Inc. v. NLRB*, 462 F.2d 812, 814 (3d Cir. 1972), cert. denied 409 U.S. 1008 (1972); *Misericordia Hospital Medical Center v. NLRB*, 623 F.2d 808, 813 (2d Cir. 1980). Employees have the fundamental right to urge their coworkers to support the union, on company property, outside working hours. *Republic Aviation v. NLRB*, supra.

we find no policy reason to disregard present decisional law to find that since a union organizer serves the union as well as the company he is eliminated from the definition of employee under Section 2(3) of the Act.³⁶

Having carefully reviewed the language of Section 2(3), its legislative history, policy, and the wealth of decisional law interpreting this statutory provision,

³⁶ We find no merit in the Respondent's contention that because an employer's payment of wages to the organizer partially offsets the union's obligation to pay him, this payment may violate Sec. 8(a)(2)'s proscription against employers contributing financial support to unions. Organizer employees are paid by the employer for work performed for the employer, not for the union. We also note that Sec. 302 of the Labor Management Relations Act specifically contemplates that paid union personnel can be "employees" of other employers. Thus, although Sec. 302 generally prohibits employers from paying union employees, it expressly exempts payments by employers "to any . . . employee of a labor organization, who is also an employee . . . of such employer, as compensation for, or by reason of, his service as an employee of such employer. 29 U.S.C. § 186(c)(1) (1988).

The Chamber of Commerce asserted at oral argument that paid organizers are not 2(3) employees because they work for labor organizations which are not "employers" under Sec. 2(2). We reject this argument. Although Sec. 2(3) expressly excludes individuals who work for persons who are not statutory "employers," labor organizations are 2(2) "employers" of their own employees. Further, it is immaterial for purposes of our analysis whether unions are statutory employers; the organizer derives his "employee" status from his employment, or attempted employment, with the hiring entity. Thus, for example, an agricultural employee (who is excluded under Sec. 2(3)), or a Federal Government employee (who works for an entity outside Sec. 2(2)), would nonetheless be a 2(3) employee if he sought dual employment with a statutory employer.

we reaffirm our adherence to *Oak Apparel* and its progeny. We conclude that full-time, paid union organizers are "employees" entitled to the Act's protections.

For these reasons, we conclude that all the applicants, including Priem and Shafranski, who sought employment with the Respondent on September 7, 1989, were employees within the meaning of Section 2(3) of the Act. Thus, we adopt the judge's findings that the Respondent violated Section 8(a)(3) and (1) of the Act by refusing to consider for employment the 10 applicants named by the judge because of their union affiliation and by subsequently discharging Hansen because of his organizing efforts.

ORDER

The National Labor Relations Board orders that:

A. Respondent Town & Country Electric, Inc., Appleton, Wisconsin, its officers, agents, successors, and assigns, shall take the action set forth in the recommended Order of the administrative law judge.

B. Respondent Ameristaff Personnel Contractors, Ltd., Minneapolis, Minnesota, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Coercively interrogating job applicants concerning their union membership.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Post at its facility in Minneapolis, Minnesota, copies of the attached notice marked "Appendix."³⁷ Copies of the notice, on forms provided by the Regional Director for Region 18, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notice to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(b) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

MEMBER OVIATT, concurring.

For reasons set forth in my concurring opinion in *Sunland Construction Co.*, 309 NLRB 1221 (1992), I join in the majority's findings in this case.

MEMBER RAUDABAUGH, concurring.

For the reasons stated in my concurring opinion in *Sunland Construction Co.*, 309 NLRB 1221 (1992), I concur in the finding of a violation here.

³⁷ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
 POSTED BY ORDER OF THE
 NATIONAL LABOR RELATIONS BOARD
 An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT coercively interrogate job applicants concerning their union membership.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

AMERISTAFF PERSONNEL
 CONTRACTORS, LTD.

DECISION

STATEMENT OF THE CASE

JOEL A. HARMATZ, Administrative Law Judge. This case was tried in Minneapolis, Minnesota, on December 11-14, 1989, on an initial unfair labor practice charge filed on September 25, 1989, and a consolidated complaint issued on November 16, 1989, alleging that the Respondents are joint employers on a specific project in International Falls, Minnesota, and in connection therewith engaged in numerous independent 8(a)(1) violations, and, further, violated Section 8(a)(3) and (1) of the Act by refusing since September 7 to hire 12 applicants for employment; by since September 13, refusing to hire Charging Party Charles Evans; by on September 14, discharging Malcolm Hansen; and by since September 20, refusing to hire Roger Kolling. In duly filed answers, the Respondents denied that any unfair labor practices were committed. Following close of the hearing, briefs were submitted on behalf of the General Counsel, the Charging Party, and separately, for each of the Respondents.

On the entire record, including my opportunity directly to observe the witnesses and their demeanor,¹

¹ The witnesses presented by each side to this controversy, for the most part, were not entirely credible, thus, complicating the factfinding process. In that connection, my direct, personal observation of the witnesses was often a factor influencing resolutions of credibility. However, plausibility, or the lack thereof in a line of testimony, was given greater weight and was the controlling factor more often than not. It is for this latter reason that many critical resolutions follow no clear pattern and facially appear asymmetrical. Thus, in certain instances, I believed and disbelieved the same witness, though the testimony conflicted with the same opposing

and after considering the posthearing briefs, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, Town & Country Electric, Inc., a Wisconsin corporation (T & C), from its facilities in Appleton, Wisconsin, is engaged as an electrical contractor in the construction industry. In the course of that operation, it annually provides services valued in excess of \$50,000 directly to customers located outside the State of Wisconsin.

The Respondent, Ameristaff Personnel Contractors, Ltd. (Ameristaff), a Wisconsin corporation, from its facilities in Green Bay, Wisconsin, is engaged in operation of a temporary employment agency. In the course of that operation, Ameristaff annually provides services to T & C valued in excess of \$50,000.

On the foregoing, I find that the Respondents T & C and Ameristaff are employers engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATIONS INVOLVED

The complaint alleges, the record demonstrates, and I find that the International Brotherhood of Electrical Workers, Local 292, AFL-CIO and its sister, Local Union 343, admit employees to membership and, at least in part, exist for the purpose of representing them in the negotiation and adminis-

witness. These diverse, seemingly inconsistent resolutions, were framed on the basis of my impressions which varied as the context shifted, rendering one line more logical than the other.

tration of collective-bargaining agreements, and hence are labor organizations within the meaning of Section 2(5) of the Act.

III. ALLEGED UNFAIR LABOR PRACTICES

A. *Preliminary Statement*

This is another case in which recruitment patterns and hiring decisions by a "merit shop" contractor have collided with the job recovery strategy of unions in the construction industry.² Merit shop is a code word for nonunion. Being a merit shop employer, the Respondent T & C, was unaffiliated with any labor organization. Its electrical operations, however, require access to craftsmen whose skills are comparable to those traditionally represented by AFL-CIO building trade unions, namely, the International Brotherhood of Electrical Workers.

Early in September 1989,³ T & C was awarded electrical renovation work at a paper mill operated by Boise Cascade in International Falls, Minnesota. Work at that location was to be performed in accord with the Minnesota law. Among the statutory restrictions is a requirement that one electrician licensed by the State be employed for every two engaged in electrical work on the job.⁴ Based in Appleton, Wisconsin, T & C was a nonresident contractor, with limited experience on Minnesota projects.

² See, e.g., *Sunland Construction Co.*, Case 15-CA-10618-1, et al. (9/5/89); *J. E. Merit Constructors*, JD-13-90, Case 15-CD-10661 (1/26/90).

³ All dates refer to 1989, unless otherwise indicated.

⁴ The Minnesota requirements for licensing are: (1) 8000 hours of verifiable craft work, and (2) successful completion of a Class "A" journeyman electrician test.

Work was to begin on Monday, September 11. T & C, the largest nonunion electrical contractor in the State of Wisconsin, in early September, did not have a single electrician licensed in Minnesota, either within its files or among its work force of some 260.⁵ Moreover, as a nonunion operator, T & C does not solicit from, and hence could not fill its need from union hiring halls.

To obtain qualified electricians, and ultimately to locate craftsmen licensed in Minnesota, T & C retained Respondent Ameristaff, a temporary employment agency, to stir the labor markets, and ultimately, to stand, at least frontally, as the immediate employer of the manpower secured for T & C's account.

The instant complaint arises from union efforts to infiltrate the recruitment process. Attempts of this sort to obtain work with nonunion contractors, and organize them from within, stands as a recent innovation. It is a marked departure from historic measures used by building trade unions in the ongoing struggle to preserve jobs and negotiated labor standards. In the past, most, if not all, skilled trade unions had endeavored to protect their respective crafts by denying skilled labor to nonunion contractors, a tactic highly effective in a transient industry, where hiring halls provide a convenient source of qualified craftsmen in virtually all geographic areas. This sequestration of union labor was facilitated by constitutional bans on nonunion employment, which are subject to enforcement against members through internal disciplinary machinery. In recent years,

⁵ This figure includes about 25 unskilled workers, 71 indentured apprentices, and 130 journeyman electricians.

however, employment opportunities with union contractors have declined, causing construction unions to take a second look at the growth of nonunion competition. To that end, a market recovery strategy was fashioned as a means of organizing nonsignatory employers. Hence, in 1988, Locals 292 and 343 authorized their membership to work nonunion, if for organizational purposes. (R. Exhs. 4(c) and (e).) A fund was established to reimburse members for wage, travel, and health benefit differentials, that he suffered on such jobs.

This strategy was unleashed against T & C under conditions of surprise during a Minneapolis recruitment effort waged in conjunction with the Boise-Cascade project. Thus, T & C's response to the union initiative forms the premise for allegations of discrimination on behalf of disappointed job seekers, all members of Local 292, who responded in person at a recruitment session held at a Minneapolis hotel on September 7, and others who made individual phone contacts with T & C. Of the applicants, a single member of Local 292 was hired, and the General Counsel contends that this individual, Malcolm Hansen, was discharged unlawfully on September 14, after unsuccessful attempts on behalf of T & C, to curtail his organizational activity.

B. *Concluding Findings*

1. The joint-employer issue.

Operationally, T & C's arrangement with Ameristaff afforded access to manpower, under a shield from traditional employment obligations. Unlike T & C's own employees, T & C assumed no liability for fringe benefits as to those carried on the payroll of

Ameristaff and other similarly situated agencies with which it deals. Insofar as might be discerned from this record, Ameristaff's involvement in connection with the Boise-Cascade operation was restricted to advertising, communicating with job prospects, compiling completed applications, arranging the accommodations for interviews, and completing the paperwork necessary to maintain payroll for those hired. Ameristaff neither interviewed, nor influenced hiring decisions,⁶ and had no presence, and hence no overseeing role, at the Boise-Cascade jobsite. Most, if not all, conventional employment prerogatives were retained by T & C. Interviewing, hiring, supervising,⁷ the setting of wage rates and granting of increases,⁸

⁶ Steven Buelow, Ameristaff's president, testified that he had no role during the Minneapolis recruitment operation other than to distribute and collect applications. Defferding testified to the contrary, suggesting that, at least in the case of Malcom Hansen, who was "selected" by Defferding and Sager, Buelow was involved in that process "because he [Hansen] was going to be Mr. Buelow's employee." As between the two, Buelow overwhelmingly was the more credible.

⁷ According to Buelow, Ameristaff "never purported to supervise or direct employees" of its clients. An instructional guide provided to employees by Ameristaff states that: "All client rules and regulations apply—you are working under their direction and supervision." G.C. Exh. 14.

⁸ As shall be seen, Malcolm Hansen was the sole Ameristaff employee on the Boise-Cascade job. T & C established his wage rate. When Hansen received a wage increase, it was at T & C's election. According to Steven Buelow, Ameristaff's president, it billed T & C based on a formula which incorporated Hansen's wage rate and per diem as a multiplier.

and, for all intents and purposes, discharges,⁹ were matters reposed to exclusive discretion of T & C operatives.

On these facts, it is indisputable that T & C exercised plenary authority and control over employees retained by Ameristaff for its account. In these circumstances, even absent a joint-employer relationship,¹⁰ Ameristaff, having a mere nominal role, possessed the legal vestiges of an agent whose conduct, in connection with the manning of the Boise-Cascade job, was binding on T & C.¹¹ See, e.g., *Storall Mfg. Co.*, 275 NLRB 220 fn. 3 (1985).

2. The embassy suites allegations

a. *The issues*

This phase of the case is premised on a mass refusal to consider certain Local 292 members¹² in the

⁹ Buelow testified that on September 13 he was informed by T & C to terminate Hansen. His lack of control in such matters was explained as follows:

[T]he client has the ability to terminate that contract at any time If the guy is not working out or if they didn't have any more work for them, they have the right to terminate the contract.

¹⁰ T & C contests joint-employer status, citing authority which is inapposite. Thus, see *Slurry Matic, Inc.*, 169 NLRB 184, 185 (1968), concerned an allegation that two entities were a "single employer," a concept subject to a more rigorous test than joint employer. See, e.g., *Pacific Mutual Door Co.*, 278 NLRB 854, 858 fn. 18 (1986).

¹¹ The opposite does not follow. Thus Ameristaff shall not be deemed responsible for independent unlawful conduct on the part of T & C over which it had no authority or control.

¹² Local 292's geographical jurisdiction includes the Greater Minneapolis area and the five surrounding counties.

course of an interview session conducted in Minneapolis on September 7. All but two that attended, completed applications at that time. Only one covered by this immediate allegation was interviewed. In addition to the alleged discrimination, certain independent 8(a)(1) allegations are imputed to Ron Sager, T & C's manager of human resources, and Steven Buelow, Ameristaff's president and owner. The coercive conduct includes interrogation of applicants concerning their interest in union work; statements that applicants would be employed only at union projects; threats that those without "appointments" would be placed in a file for union jobs only and would not be considered for employment on non-union jobs; and statements that union members could not be hired.

The Respondents deny that their representatives either unlawfully questioned, threatened, expressed a preference, or attempted to impede organization. Furthermore, it is argued that the failure to interview those present, was based on considerations totally unrelated to union activity. Thus, T & C urges that I credit evidence that the time available to complete the process impelled T & C to confine interviews to those with prescheduled appointments.

b. *Factual overview*

Ron Sager was primarily responsible for manning the Boise-Cascade job. He was informed in late August or early September that T & C had secured an electrical contract in International Falls, Minnesota. He testified that he was told that the job was to be treated as a short-term operation, since T & C would have to survive a 3-month trial period to be retained.

Initially, Sager faced two problems. First, he had little lead time, as work was scheduled to begin on September 11, and, second, he had no clear source of required manpower. Moreover, because the job was described as short term, he allegedly did not wish to hire from the outside on a "permanent" basis. Therefore, on September 1, he contacted Steven Buelow, Ameristaff's owner and president, requesting that Buelow investigate the availability of electricians for a "short term" job in Northern Minnesota, adding that he needed an answer by 5 p.m.

Having been retained by T & C to recruit qualified electricians, Ameristaff followed up in area newspapers. On September 3, 1989, a blind advertisement appeared in a major Minneapolis newspaper announcing employment opportunities for "licensed journeymen electricians." Despite Sager's testimony that the job was short term, the ad described the project as having a "two-year" duration. (G.C. Exh. 2.) The telephone number of Ameristaff was included.

Members and officials of Locals 292 and 343 learned of the advertisements. Unemployed members were encouraged to respond.

On September 5, according to Buelow, Sager made it clear that among other things, any prospects had to be "able to work a merit shop," which quite correctly was understood by Buelow as reference to a nonunion shop. Buelow relates that, at some time prior to September 7, this was clarified by T & C to mean those willing to relocate and "work a merit shop."

Ameristaff customarily prescreens applicants to determine if they meet the client's criteria. In anticipa-

tion of responses to the ads, Buelow set up a screening process for Ameristaff's receptionist, Lorrie. She was instructed, *inter alia*, to inquire whether job seekers preferred to work union or nonunion, and that, should they respond that they were in a union, or had only worked union, Lorrie was to ask if they would work nonunion.

Sager relates that on Tuesday, September 5, after the ad had run, Sager first learned of the journeyman/helper ratio under Minnesota law. For this reason, Sager instructed Ameristaff that only licensed electricians interested in working for a merit shop employer would be hired for the Boise-Cascade job. Ameristaff had been informed that T & C needed more than one licensed electrician. On September 5, Ameristaff was first informed, on a confidential basis of the location of the job.

As indicated, work was to commence at International Falls on Monday, September 11. Sager and the designated project manager, Dennis Defferding, were aware, at least since September 5, that the job could not begin until hire of at least one journeyman or master electrician who was licensed in Minnesota. Thus, Sager's testimony that as of September 7, he was "pretty anxious" to hire a licensed electrician comes as no surprise.

To meet this requirement, Buelow, had scheduled appointments for the Embassy Suites in Minneapolis on Thursday, September 7. That day, T & C chartered an aircraft to transport Buelow, and T & C's Sager and Defferding from Appleton, Wisconsin, to Minneapolis. About 14 unemployed members of Local 292, including 2 full-time salaried officials of that organization, appeared at the Embassy Suites in quest

of work. Applications, under Ameristaff logos, were distributed and completed. Interviews were conducted by Sager and Defferding. Three were interviewed, two were offered jobs, but only one, Malcolm Hansen, was hired. However, the hiring process was cut off before any others would be interviewed. None of this latter group was subsequently contacted by T & C.

c. The evidence

The complaint identifies 12 applicants, all members of Local 292, as having been denied employment wrongfully in consequence of the September 7 interview session. Those named are as follows:

Ken Axt	Red Larson
Steve Claypatch	Roger Chartrand
Steve Leyendecker	David Hagen
Robert Hallman	Bob Printy
Craig Jones	Greg Shafranski
Harley Barton	Michael Priem

Of this group Priem and Shafranski were paid business representatives of Local 292.¹³ The rest, including Claypatch, a nonpaid member of that Local's executive board, were apparently unemployed.

All except Chartrand filed applications.¹⁴ Of this group only Jones was interviewed. Parenthetically,

¹³ T & C argues that Priem and Shafranski, because of their status as paid, full-time union officials, are not entitled to redress under the Act. As matters now stand, that issue is currently before the Board on remand and might well be subject to reconsideration in *H. B. Zachry Co.*, [289 NLRB 838 (1988)], *enf. denied* 886 F.2d 70 (4th Cir. 1989). Under current Board policy, however, this defense is nonmeritorious.

¹⁴ G.C. Exh. 13. Chartrand arrived late, after applications were solicited. He testified that he was denied an opportunity

it is noted that a longstanding member of Local 292, Malcolm Hansen, was interviewed and actually hired. The third and only other person extended an interview was Gary Weseman, a nonaffiliate of Local 292.

More specifically, a composite of credible testimony of Sager and Priem reveals that, due to a flight delay, the interview team did not arrive until 11 a.m. Two rooms had been reserved. One was arranged as a waiting area, with refreshments and tables for completing applications; the other was used for actual interviews. After the entire group repaired to this area, those assembled were addressed initially by Sager. He first explained the benefits provided by T & C, including its health and 401(k) plan. Buelow of Ameristaff then distributed applications, which bore the Ameristaff logo, for completion by those present. (G.C. Exh. 3.) Later, Buelow gathered the completed applications and carried them to the room in which interviews were conducted.¹⁵

to submit an application because those officiating were in a hurry to leave. He states that someone took his name, address, and telephone number, advising that he would be in touch. Chartrand, who claims to have been desperate for work, received no further contact. Another individual who arrived late, failing to file an application was Steven Shannon. His name was deleted from the complaint at the outset of the hearing. In her posthearing brief, counsel for the General Counsel represented that Shannon arrived after the interview team had left and hence had no personal contact with them.

¹⁵ I reject Priem's uncorroborated testimony that after collecting the applications, Buelow stated that they needed eight people immediately for this project. From all indications on this record, that figure went well beyond T & C's needs, and Priem's testimony in this regard impressed as a pat, unbelievable attempt to broaden the former's liability under this complaint.

Craig Jones was the first interviewed and Gary Weseman, the only nonmember of Local 292, was second. It is important to bear in mind that Weseman was the only applicant present that Buelow had previously scheduled for an interview. (R. Exh. 10.)

There also is no dispute that Buelow, after collecting the completed applications, returned to the waiting room. A dispute existed as to what was said, but under all versions, it is clear that the applicants were informed that the job in question was non-union.¹⁶ After Buelow was informed that the men were interested in any work available, he left again. He again returned after about 15 minutes to read off a list of seven names. None were present. Buelow identified this group as those with prearranged appointments, then stated that: "we don't know if we can interview the rest of you because you didn't have appointments." Buelow was advised by Priem that at least eight licensed journeymen were present who could take the place of those with appointments.

After this, Buelow again left the waiting area, this time returning with Sager. The latter informed that he had to catch a plane and that: "We are only going to interview people that had appointments and . . . we are asking everybody to leave if you don't

¹⁶ Buelow claims that Ameristaff enjoys a clientele which includes union as well as nonunion contractors. The union contractors are not identified, nor are the particular unions with which they deal. Customarily, however, construction contractors that have bargaining relationships with *affiliated* craft unions, will obtain skilled personnel from the latter's hiring hall, either on a compulsory or voluntary basis. To say the least, Buelow's testimony aroused curiosity as to why this class of "unionized contractors" would bother with a commercial, fee-based, manpower agency.

have an appointment." Malcolm Hansen protested, stating that he called the number in the newspaper ad and was told to "show up." He announced that he would not leave until interviewed. Sager then threatened to call the local authorities and have them removed. However, he also informed Hansen that he would check and if Hansen had an appointment he would "honor the commitment." When Sager was informed by Buelow that Hansen had called Ameristaff that morning, he elected not to labor the point, but to interview Hansen, while announcing to the others: "I will not interview anybody else, because we've got to get going." Hansen was hired. Thereafter, the session was terminated. Other than Hansen and Jones, no one that completed an application that day was ever interviewed or, for that matter contacted, by either T & C or Ameristaff.

d. *Analysis*

(1) The discriminatory refusal to employ

The 8(a)(3) allegations concerning this group might be viewed from two perspectives; namely, the failure to interview and the post-September 7 failure to seek out the union allied, job seekers during T & C's ongoing quest for licensed electricians.

Before considering the General Counsel's case, the issues might be simplified by acknowledging T & C's contention that on or about Tuesday, September 12, Sager received information which made it economically infeasible to consider the Embassy Suites applicants. It was confirmed at that time that under Minnesota law, Ameristaff could not be used as the employer of licensed personnel on the Boise-Cascade job. Yet, T & C would incur liability for "placement

fees" if it used the Embassy Suites applications, all of which were solicited by Ameristaff. The minimum guarantee to Ameristaff would be \$1320 per applicant. T & C argues that to avoid this expense, that avenue was abandoned in favor of in-house recruitment.¹⁷

The evidence supporting this claim is beyond suspicion. It basically conforms with my understanding of the business practices generally followed by suppliers of temporary manpower. To this extent, and insofar as the allegations cover the timeframe after September 7, the Respondent has met its burden of showing that these applications would not have been activated thereafter even if those seeking work were nonunion. See *Wright Line*, 251 NLRB 1083 (1980). I am persuaded that based on the "placement fees," the Embassy Suites applicants, as *unknown quantities*, would not have been considered for employment after T & C learned of Ameristaff's nullification. Other than speculation, the General Counsel has offered no cause to believe otherwise.¹⁸

¹⁷ During the ensuing week, T & C embarked on this independent search. The campaign began with the placement of ads in Minnesota newspapers and those published in surrounding States as well as Colorado, Louisiana, and Texas. Although Sager testified that the Minneapolis papers were included, documentary evidence proved this to be untrue. G.C. Exh. 17. Sager also testified that he made numerous phone calls in the effort to locate electricians licensed in Minnesota.

¹⁸ I have no quarrel with Buelow's testimony that it was his intention—concerning applications garnered at the Embassy Suites (G.C. Exhs. 13(a)-(k))—to verify employment references, but he did not do so because Ameristaff was off the job the following week.

However, this view does not offer a complete defense. For, it fails to embrace earlier events, including any peremptory refusal to interview and consider for employment the disappointed job seekers at the Embassy Suites. If unlawfully motivated, T & C's failure to interview at that time on pending applications created an ambiguity, to be resolved against the wrongdoer, warranting an assumption that the alleged discriminatees, if given a chance, would have been hired, would have demonstrated proficiency, and would have been retained directly by T & C after Ameristaff's disqualification.¹⁹ Thus, the events at the Embassy Suites remain viable and are central to the 8(a)(3) allegations in this case.

In this regard, there can be no question that, as of September 7, T & C was hard pressed to hire licensed electricians. At that time, operations were expected to commence at Boise Cascade on Tuesday, September 12. In the interim, between September 1 and 5, it does not appear that it had secured a single journeyman electrician either from its rolls or through Ameristaff's efforts. Indeed, on September 5, the opportunities for locating qualified personnel was squeezed further. On that date, T & C learned that Minnesota regulations precluded any operations absent an electrician licensed in that State. As of September 7, it had not secured a single electrician meeting this requirement. Moreover, T & C's des-

¹⁹ This is not meant to imply that in the event of a finding of illegality, all named discriminatees would be entitled to monetary redress. Thus, in that event, the Respondents could cut backpay liability by demonstrating in an appropriate compliance proceeding that fewer jobs were available than discriminatees.

perate posture at the Embassy Suites was compounded by the fact that, if this venture failed, only 4 days would remain, a timeframe made even more critical by intervention of a weekend.²⁰

It is in this light that the curtailment of interviews on September 7 must be evaluated. The underlying facts, without question, demonstrate that the

²⁰ It is not entirely clear, and it need not now be decided, just how many licensed electricians would be required at startup. Yet, I am convinced that the Embassy Suites venture fell far below expectations. Thus, a classified ad reappeared in the Minneapolis newspaper on Monday, September 11, this time describing the project as of 4-year duration. G.C. Exh. 4. Sager testified that the Respondent planned to hire 4 to 6 journeyman electricians "the first couple of weeks" on the job, and then to increase to 8 to 10 for the remainder of the job. Defferding's testimony suggested that T & C was less ambitious, at least, in terms of its hopes for the early weeks. Thus, he testified that T & C hoped to pick up one or two through Ameristaff's September 7 interviews. He added that if only one were hired, the actual work force could be expanded beyond the 2 to 1 ratio. This refers to state licensing procedures which permit unlicensed personnel to obtain temporary permits, pending completion of the certification process, allowing them to work without counting against the ratio. Defferding testified that it was T & C's intent to use two of its own employees in that fashion, thus, allowing a total work force of five, including the licensed journeyman. As matters turned out, only one T & C employee, Michael Grow, obtained a temporary license. For this reason, Project Superintendent Rodney Smithback, though on the site at all times, was essentially relegated to paperwork and could not legitimately work with the tools. On cross-examination, Defferding admitted to telling a Board investigator that in early September, T & C anticipated a need for 15 to 30 electricians on the job. I had my doubts about Defferding's account, but, in any event, issues of this nature are best left to an appropriate compliance proceeding.

Respondent elected not to consider applicants who were present, and who offered themselves as available for work and qualified as licensed electricians.

Sager's own testimony confirms that the decision not to conduct further interviews was announced only after the T & C operatives were informed that this group was believed to be allied with an affiliated labor organization. Thus, Sager relates that, after the interviews of Jones and Weseman, Buelow reported that none of the others had appointments. Sager expressed curiosity as to how those without interviews knew that the T & C representatives were present. Sager then allegedly told Buelow that they were late and had to get back to Appleton, stating that, "as bad as we needed people," he didn't want to waste time with them if Buelow "didn't screen them like the others." Buelow was told to doublecheck to assure that those waiting had no appointments. He returned, stating that those waiting had become a bit unruly. Sager admits that he at this point learned of their union affiliation, as Buelow showed him several applications, commenting, "I think they're union." Sager suspected that T & C was being harassed or being set up. He admits that it was at that point that he and Defferding decided to announce, for the first time, that interviews would be extended only to those with appointments. Sager concedes that the announcement was made before anyone had accepted employment and without knowledge that anyone present had an appointment. Thus, at that juncture, he was resigned to writeoff the Minneapolis trip as a total failure. T & C remained unprepared to meet its scheduled Boise-Cascade starting date, and merely had 2 working days to accomplish what it had not in the past 7.

Considering the circumstances confronting T & C at the time, and the fact the Embassy Suites venture was aborted immediately after learning of the union affiliation of those present, an inference is warranted that—notwithstanding the subsequent hire of Hansen—this step was taken against applicants, who together offered a broad source of ostensibly qualified electricians, at least in part on antiunion considerations.²¹ Thus, the onus was on the Respondents to demonstrate that these applicants would not have been interviewed and considered even if not union members. See *Wright Line*, 251 NLRB 1083, 1089 (1990).

The defense begins with T & C's declaration that it was not antiunion, an argument which springs from the estimate that some 40 percent of its employees are or were members of the IBEW. This demographic is more a function of the impact of union training and apprenticeship programs on employment markets than any desire on the part of this "merit shop employer" to let down its guard. Indeed, T & C's own position suggests that those hired were known to be union renegades, and hence posed no organizational threat. The 40 percent statistic was furnished by Sager himself. When called on to explain how he knew of his employees' union status, Sager stated:

²¹ The existence of an untoward motivation is hardly impaired by suspicion that emerges from the Respondent's recruitment strategy following termination of Malcolm Hansen on September 14. Thereafter, the Respondent placed ads in numerous newspapers within the State of Minnesota, but, inexplicably, declined to use newspapers based in the Minneapolis area. G.C. Exh. 17. Imagination is not taxed by one's attempt to reckon the reason for this omission.

[We]’ve gotten . . . statements from the people we’ve hired, that they have gotten letters in mail that they are going to be fined or that now that they are no longer a part of the union, they are working for nonunion, they have to appear before a committee of some sort and then they bring that to our attention.

Along this same line, in its posthearing brief, T & C states that it “knew that the Union’s constitution and by-laws prohibited union members from working for nonunion employers,” and that T & C therefore “believed the union opposed the hiring of any of its members by a nonunion employer.” From this frame of mind, T & C would assume that competent electricians could be added to its payroll with little risk that ardent union members would be among those hired.

Any notion that T & C open its door with equanimity to qualified craftsmen who overtly manifested an intention to organize would be inconsistent with the economic goals of this avowed “merit shop employer.” The business posture of T & C is no different than those familiar to other nonunion contractors, including that involved in *J. E. Merit Constructors*, JD-13-90, pp. 7-8. The observations there apply with equal force to T & C:

[T]he Respondent considers itself as among the class of contractors which refer to themselves as “merit employers.” This is nothing more than a “buzz” reference to nonunion shop. It is a calling antithetical to any form of contractual relationship with traditional building trade unions. Indeed, one might fairly assume that

this class of employers, at least in the area of costs, enjoys a labor-oriented, competitive edge in an industry where bidding wars generate revenues, and effective performance turns upon the ability to attract competent workers on a casual, short term basis. The benefit of operating nonunion in this industry is magnified when one considers that most industrial maintenance work is more labor intense than customarily encountered in other forms of construction activity, with the ratio of labor to material costs proportionately higher.

There can be little debate that any formal organization drive by an affiliated labor union challenges this fundamental economic advantage. It follows that indiscriminate hiring from that source clearly would enhance that peril. In this light, hiring decisions confronting the Respondent . . . may be equated with a choice between suicide and survival.

Beyond the foregoing, the Respondent’s explanation for the termination of interviews is founded on Sager’s parole testimony as to intentions, not communicated to those present until after their union affiliation was discovered. Thus, it is the sense of his testimony that he at no time wished to interview anyone without a scheduled appointment and who had not been screened by Ameristaff. Yet, as indicated, prior to his learning of union involvement, no attempt was made by either Ameristaff or T & C to single out or identify those with appointments, nor was there an earlier suggestion that appointment was requisite to interview.

In this regard, however, Sager testified that, on arrival at the Embassy Suites, he simply assumed that all present had appointments.²² He claims that he first learned that this was not the case when Buelow reported that this was not so. Thus, if Sager is to be believed, it was his intent from the outset, albeit unannounced, to interview only those with appointments, and that Buelow's report concerning the union status of those waiting did not inspire any such judgment.

The General Counsel attacks Sager's credibility on a number of grounds. First, it is argued that, on arrival, he knew, or should have known, that more job seekers were present than the seven with appointments. This raises a preliminary issue as to just how many applicants were present when the interview team arrived an hour and 30 minutes late.

Sager testified that only four to six prospects were present, prompting him to remark that it appeared that only those with appointments showed up. This is somewhat consistent with Defferding's observation that when the management team arrived at 11 a.m., "there were a couple of gentlemen in the lobby . . . waiting for us." However, according to Michael Priem, he and Greg Shafranski, both business representatives of Local 292, arrived at the Embassy Suites at about 8:30 a.m. on September 7, only to learn that the representatives of T & C and Ameristaff had been delayed. He testified, with corroboration from Malcolm Hansen, that at about 11 a.m.,

²² In support of this deduction, Sager observes that there was no prior public announcement that T & C and Ameristaff personnel would be present in Minneapolis to conduct interviews.

Sager, Defferding, and Buelow arrived. Priem and Hansen offered names, but do not identify precisely which, or how many, applicants were present at that time, and how many arrived later. Both, however, testified that the interview team expressed pleasure with the size of the turnout. I believed Priem and Hansen, because their account was more plausible,²³ and also stood above other flaws in Sager's story.²⁴

Thus, Sager elected to begin the interviews with Craig Jones, who had no appointment, yet was called without inquiry as to whether any such condition had been met. Apparently, to diminish this contradiction, Sager would have me believe that, though pressed for time,²⁵ he never saw Buelow's list (R.

²³ In its posthearing brief, T & C characterizes the applicants as "intruders." However, the interview team did nothing to suggest who was, and who was not welcome until union affiliation emerged. In light of the above credibility resolutions, it is concluded that Buelow, Sager, and Defferding knew, or should have known from the outset that their were more jobseekers present than Buelow had scheduled for interview. In any event, Sager admitted that were it not for the press of time, all present would have been interviewed irrespective of any lack of appointment or prescreening.

²⁴ In this instance, Priem and Hansen are credited over Sager and Defferding. None were entirely truthful, and as shall be seen, credibility resolutions, though based on my firm impressions are not entirely consistent in their cases. All struck as a bit too flexible with truth, willing to bend and improvise to strengthen or cover weaknesses in their respective cause. However, in this particular instance, the late arrival of the interview team enhances the likelihood of the mutually consistent accounts of Priem and Hansen, it being entirely probable that by 11 a.m. most of the Local 292 members would have appeared.

²⁵ The interview team's departure for Minneapolis that morning was delayed about 2 hours due to fog. Sager testified

Exh. 10), or asked Buelow who, was scheduled, and, thus, was unmindful that Jones had no appointment. Buelow had actually scheduled seven interviews. Sager testified that on the flight to Minneapolis, Buelow advised him that these were scheduled at 20-minute or one-half hour intervals. Obviously, if all showed up, simple math indicates that the interview team would be hard pressed to make it to the Minneapolis airport by 3:30 p.m., let alone return to Appleton for the meeting allegedly scheduled for that time. In this light, it is incomprehensible that Sager made no effort on arrival at the Embassy Suites, and thereafter until union activity became an issue, to monitor the number who were present and who would later arrive that were entitled to interview, and hence might delay the return trip.

In addition, Sager sought to bolster the import of prior appointments by explaining that those lacking them would not have been prescreened by Ameristaff, and he did not wish to interview those who had not

that a "critical" manpower meeting, affecting 37 different jobs, had been scheduled for Appleton at 3:30 p.m. that very day. This, according to Sager, compacted the time available to conduct the Embassy Suites interviews. There are no written records kept of such meetings, and independent evidence that it was scheduled or held was totally lacking. Although Sager testified that the meeting was fixed, timewise, taking place every Thursday at about 3:30 p.m., no explanation was offered as to why it was necessary to schedule the Minneapolis trip that same day. Defferding was not examined as to the meeting and hence did not testify that he attended such a meeting. Sager's uncorroborated testimony in this respect does not square with his failure to diligently explore Buelow's agenda to assure effective use of the time available. He was not believed.

gone through this process. He denied knowledge, however, of what was entailed in the prescreening.²⁶ In fact, the prescreening format was a simplistic, handwritten system, designed for implementation by an Ameristaff clerical employee who would take calls from those responding to newspaper ads. In contrast, the applications compiled and available to Sager at the Embassy Suites offered a detailed basis for evaluating past experience and qualifications. Ameristaff's prescreening format developed little more than information concerning a prospect's will to work nonunion. There is no evidence that prescreening results were ever communicated in any form to either Sager or Defferding. Moreover, Jones obviously was not prescreened and no such requirement was mentioned in his case. Indeed, Buelow testified that Sager said nothing about whether he would interview people without appointments until after Buelow had made this report some of the applicants were union. In my opinion, Sager's testimony concerning prescreening was yet another false plank in his attempt to structure an explanation disassociating the sudden termination of the interview from disclosure that the waiting applicants were union members.²⁷

²⁶ G.C. Exh. 13(c).

²⁷ It is difficult to accept that Sager would insist on prescreening without knowledge of the areas probed in that exercise. I reject Sager's testimony that T & C neither solicited, nor was aware that Ameristaff was screening prospects along union lines. I would also note that T & C has attempted, albeit inartfully, to place a "spin" on the evidence fingering Sager as the progenitor of this inquiry. It is clear that Buelow denied that he was instructed by T & C to inquire into an applicant's union preferences. At the same time, however,

With the collapse of Sager's credibility, it follows that the interviews were terminated when T & C remained at "square one," with no appreciable leads to a single Minnesota journeyman. Though Sager was understandably "anxious" to man this job, this objective was displaced by a more compelling need to shun a waiting group of applicants, all, or some of whom, would qualify. His action, after learning of the union presence, is rationally explained by the inference generated under the General Counsel's case-in-chief. Accordingly, except in the case of Jones,²⁸

Sager admittedly told Buelow that the electricians had to be willing to work for a merit shop employer. Yet, the Respondent in its post-hearing brief states:

Buelow . . . prepared a prescreening form which, inter alia, asked applicants if they preferred union or nonunion work. *This inquiry was strictly Buelow's idea.* [Emphasis added.]

This is an "eye roller" of the first order. Could Buelow, who equated merit shop with nonunion, develop the information specifically requested by Sager without asking? Fairly stated, the "idea" was planted, if not directed, by Sager.

²⁸ Jones admitted that, during his interview, he characterized T & C's starting rate as an "insult." However, he denied stating specifically that he would not work for that rate. Although not given a job offer, Jones admittedly told the T & C representatives that he would have to discuss out-of-town work with his wife. He was asked whether he would consider an offer to work locally. He said he would, and then was told that his application would be kept on file. He neither contacted, nor received contact from T & C or Ameristaff, thereafter. On the face of his own testimony, T & C's officials could rightfully assume that Jones either was disinterested or would contact them after talking to his wife. In this light, it is concluded that he would not have been hired in consequence of the September 7 interview even if not allied with

it is concluded that the Respondent has failed to demonstrate by credible evidence that those named in the complaint, who filed applications,²⁹ would not have been interviewed and considered even if unaffiliated with Local 292. Accordingly, Respondent T & C violated Section 8(a)(3) and (1) of the Act by this peremptory conduct.

(2) Interference, restraint, and coercion

(a) *By Buelow*

The complaint alleges that the Respondents violated Section 8(a)(1) by Buelow's interrogation of Embassy Suites applicants as to whether they were looking for union work. In support, Priem testified that Buelow collected the completed applications, but, after about 15 minutes, he returned stating, "Are

Local 292. The 8(a)(3) allegation in his case shall be dismissed.

²⁹ Chartrand is excluded from the remedial class. He did not file an application. Buelow admitted that he took Chartrand's name and address, but observes that there was no followup because Ameristaff was removed from the job. The problem here is the element of knowledge of Chartrand's union affiliation. He avers that Buelow asked about his employment experience. However, when examined as to which contractor he identified, Chartrand did not respond directly, replying, "I had worked for Muska [a union contractor] that year or the year before." It was my impression that Chartrand was testifying from deduction, rather than what he actually told Buelow. His testimony was unreliable, and, accordingly, unlike those filing applications, there is no evidence that either T & C or Ameristaff had any basis for distinguishing Chartrand from Weseman, who acted on his own, quite independent of any union. Thus, the General Counsel, in his case, has failed to identify this latecomer with others denied interview on union-related grounds.

you looking for all union work?" Malcolm Hansen's initial testimony describes the inquiry as, "Are you men interested in union work?"³⁰

Buelow denied that he raised the "union-nonunion" issue, claiming that it was the applicants that questioned him as to the existence of union work. He claims that he replied to these inquiries by stating, "we do have both types of contractors, however, the people that were here today were representatives of Town and Country Electric and they were interviewing for the project at Boise." Thus, those present were alerted to the fact that union work was not available at that time.

In this state of events, even accepting the above accounts of Priem and Hansen, their testimony would not substantiate that Buelow's expressed curiosity was coercive. The failure by the General Counsel to analyze and cite precedent in conjunction with what, at best, presents a thin, borderline issue is inexcusable.³¹ Without benefit of guidance, it is my

³⁰ The General Counsel's witnesses were not entirely consistent. Thus, Don Larson, also a member of Local 292, testified that Buelow returned and simply announced "that this was a nonunion job." Thus, his testimony fails to reflect any element of interrogation.

³¹ Region 18 apparently gave a great deal of attention to certain evidence uncovered during the investigation which triggered the 8(a)(1) allegations in this case. Legally and factually, these issues demand the same degree of attentiveness on the part of the undersigned as the other, remedially robust issues in this case. Here, counsel for the General Counsel filed a 43-page brief, a document, virtually useless to any reasoned evaluation of the Government's position concerning the numerous independent 8(a)(1) allegations. Apparently the Charging Party assumed that the General Coun-

sel would do a better job in this regard, for it specifically relies on the General Counsel's "representations and arguments" on this issues. It is true that the General Counsel's narrative discussion imputes conduct to management representatives which might be viewed as incompatible with Sec. 7 guarantees. However, little attempt has been made to isolate these references to any definable unfair labor practice, and, certainly, no attempt is made to put forth rationale as to why, how, or under what line of thinking, the allegations should be sustained. This "scattershot" technique is inexcusable. No one knows better than the General Counsel just what evidence, theories, and precedent support the violations where a complaint incorporates multiple counts of Sec. 8(a)(1). The administrative process could be benefitted through the simple task of passing this information on so that the General Counsel's position might be understood, and the 8(a)(1) allegations resolved under conditions minimizing confusion, delay, and opportunity for error. While can appreciate that no party has an obligation to file a brief, there also is no rule obligating a litigant to make an effective presentation.

view that, in context, the inquiry as to the applicants' preferences would have no tendency to impede protected rights. Earlier, the jobseekers, who were accompanied by Local 292 business representatives, and who obviously were acting jointly to further institutional designs, had completed applications which, according to the General Counsel's own argument, contained information clearly disclosing a history of union employment at union scale. It was this, and only this willful disclosure, which served to invite Buelow's response. Against this background, it strains credulity to assume that any among this group would have sensed any degree of pressure from an attempt to clarify their preference for union or nonunion work. *Rossmore House*, 269 NLRB 1176 (1984).

The complaint also alleged that Buelow, still at the Embassy Suites violated Section 8(a)(1) by telling applicants that they would be employed "only at union projects and . . . not . . . at nonunion projects."³² This allegation is apparently based on testimony of Priem and Hansen. Priem describes Buelow as stating that Ameristaff had union and nonunion work and that the applications taken at the Embassy Suites would be placed on file until the union work came in. Priem's prehearing affidavit reflects that after he asked Buelow what would happen to the applications, the latter simply replied that they would be filed "for future job opportunities." To this Priem replied, "I think I know what file they will go into." Thus, the affidavit omits the union/nonunion dichotomy. (R. Exh. 2.) As was true there, Priem's account given at the hearing plainly amounted to his interpretation of Buelow's remarks, rather than what was actually said.

Hansen testified that Buelow stated:

[T]he contractor that we are now working with now is for nonunion jobs. There will be union work coming in later. We will keep your applications on file for a later date.

The two versions are not perfectly consistent, and in my opinion Hansen's is too vague to support a violation. The differences, together with my lack of complete confidence in Hansen and Priem, lead me to

³² The failure to brief the 8(a)(1) allegations in meaningful fashion has produced an esoteric game of mix and match. The degree of guesswork involved is suggested by the General Counsel's abstract comment that the remark covered by this allegation constitutes an unlawful "promise."

give the Respondents benefit of the doubt and the 8(a)(1) allegation in this respect is dismissed.

(b) *By Ron Sager*

The complaint alleged that the Respondents violated Section 8(a)(1) of the Act by several remarks attributed to Ron Sager at the Embassy Suites. The first involves a comment, somewhat identical to that attributed to Buelow, that those without appointments would be placed in a file for employment at union projects and would not be considered for employment on nonunion jobs. The General Counsel's brief does not mention any testimony which would be relevant to this allegation. Yet, no attempt is made to delete it. Apparently, it was more convenient to defer this allegation to the administrative law judge. After an independent study of the record, no evidence has been located which might tend to substantiate this allegation and it is dismissed.

The complaint also alleges that Sager expressed a threat that "he could not hire . . . members of a union because his customers would not allow it." The General Counsel does not specify the testimony relied on to support this allegation. My own culling of the record suggests that the allegation might pertain to testimony by three different witnesses to three distinct incidents.

The first derives from a colloquy between Priem and counsel for the General Counsel, as follows:

Q. Was anything said about the customer during Ron Sager's remarks when he came into the room?

A. Yes. *They* had stated to us that we can't hire signatory people as per our customer on this project. [Emphasis added.]

No attempt was made at the hearing to clarify that it was Sager who made the statement. In any event, if made, others would have been within earshot and I am unwilling to accept Priem's uncorroborated testimony in this respect.

A second possibility emerges from testimony by Craig Jones, who relates that, during his interview, he asked whether T & C had considered working union, and was told by Sager that they would "not be signatory to any union and that basically their customers preferred it that way." Sager could not recall making these statements. In crediting Jones, his account merely expresses a customer preference for nonunion contractors, rather than an absolute ban, and hence the statement is considered fair argumentation within the purview of Section 8(c).

The third derives from Hansen's employment interview. He claims that, in the course thereof, Sager said, "Well, you know, our customer up there is . . . Boise Cascade. . . . We can't have any signatory employees up there." "Our customer, Boise Cascade, will not allow it." Sager denied any such remarks. Defferding could not recall any conversation to the effect that they couldn't have union signatory people at Boise Cascade, or that Boise Cascade, wouldn't allow such employees into the plant. As indicated below, I believed Sager over Hansen, in connection with coercive comments the latter attributed to Sager during his employment interview. Accordingly, any 8(a)(1) allegation based on this incident is dismissed.³³

³³ Recently, the Board appears to have hesitated over possible 8(c) protection for antiunion argumentation founded on customer preferences. See *Harrison Steel Castings*, 293 NLRB

The complaint also alleges 8(a)(1) allegations on grounds that Sager:

(i) threatened that "an applicant for employment would be required to resign membership if hired," while questioning the applicant as to whether he would comply, and (ii) threatened that an "applicant could not discuss unions or organize on behalf of unions at the Boise Cascade site."

These allegations presumably are predicated on testimony of Hansen as to what transpired during his interview at the Embassy Suites. Hansen's version, in material part, is as follows:

Well, they called me in there and they said, "Well, we know you are a union member." I said, "Yes, I've been a union member for 28 years." And then we talked about the job up there and what it consisted of, and Mr. Sager asked me . . . so I went through basically my work experience since 1956.

I think then Denny Defferding went into that he was once a union member and that any people they hire, once they hired them, they expect them to drop their union membership, and Denny Defferding asked me if I would be willing to do that, and I responded with "whatever."

Ron Sager was very emphatic that there would be no talk about union, no organizing. He said

1158 (1989). The General Counsel, having failed to analyze the issue, or cite any authority whatever, again, in context of a debatable issue, has dumped its own responsibility as an adversary on the administrative law judge.

we could talk about fishing, hunting, women, but there will be no talk about the union in any shape or form.

After a break in the interview, Hansen returned and was hired. He claims that Sager stated at that time, as follows:

We've got to trust each other. We've got to be confident [sic]. We don't have to tell what we know. "In fact there is two people out there in the hall. I imagine they are waiting for you. I imagine they are union members. Don't tell them anything. . . . You don't have to." I asked him, I said, "Well, when will I be getting this vacation and hospitalization and all that you offered?" Well, he said, "As soon as you and I can agree on that you are coming to Town & Country permanent and you drop your union membership, you will receive all those benefits."

Sager testified that during the first interview, Hansen volunteered that he was trained by and a member of the IBEW. He denied that either he or Defferding inquired as to his union status. Sager denied any statement that Hansen had to drop his union membership before getting on T & C's payroll. He denied that anything was said at that time concerning Hansen's right to discuss the union on or off the job at Boise Cascade, nor was his right to engage in organization activity discussed.

Defferding, when asked if he had questioned Hansen about the Union, stated: "I don't remember asking the question, I just remember it came up. I believe he volunteered it because we had no problem with

it."³⁴ Defferding testified that, once disclosed, the only comment concerning Hansen's membership pertained to whether, as a union affiliate, he had any problem accepting employment with a "merit shop" because others who did so, later were exposed to threats. Defferding denied that anything was said concerning trust and confidentiality. He also denied that Hansen would be required to drop union membership before going on T & C's payroll. He denied that Hansen was told that he could not organize on that job, or that there were limitations on his right to do so.

Neither Hansen, Sager, nor Defferding impressed as impeccable witnesses. In many areas, I would prefer Hansen over defense witnesses, including Sager and Defferding. However, in this instance, T & C is given benefit of the doubt. Hansen was given a job out of Respondent's desperation, with knowledge of his union history. Prior to his interview, Sager and Defferding were alerted to a possible union attempt to infiltrate the hiring process, and, between interviews, Hansen was observed cavorting with his union "bud-

³⁴ Defferding was, perhaps, the least impressive witness. There are many reasons why I have great difficulty entertaining the notion that T & C was indifferent to union affiliation. For reasons already given, I have difficulty accepting that T & C operatives were unaware of the content of Ameristaff's screening process. Moreover, prior to this interview, Buelow reported that the presence of union members might well constitute a threat to the recruitment process, a development which would arouse strong curiosity as to possible involvement of those yet to be interviewed. The suggestion by Defferding that T & C was indifferent to union allegiances hardly enhances his credulity in this proceeding.

dies.”³⁵ In this light, probability leads me to believe the testimony that T & C would have finessed the union issue, rather than address it with the heavy-handedness suggested by Hansen. On the basis of Sager’s credited denials, the 8(a)(1) allegations emerging from this interview are dismissed.

3. The termination of Hansen

a. Overview

The second major combination of allegations relates to the employment of Hansen, who had been a member

³⁵ Hansen’s interview was conducted in two parts. Defferding testified that, during the interval between those meetings, he observed Hansen talking with his union “buddies.” He claims that, for this reason, when Hansen returned, Defferding asked: “are they giving you a hard time because you are considering working for us[?]” Thus, Defferding claims to have assumed that ill will was blowing between Hansen and other applicants. This is incredulous. Hansen at the time had not been offered a job. Like, Hansen, his union “buddies” were present in quest of jobs. That Defferding could have read conflict between Hansen and any of the applicants is pure nonsense. I am convinced that Defferding’s concern stood on more pragmatic grounds. Before treating with Hansen, Defferding and others on the interview team had been alerted to union intervention in connection with the manning of this job. Being sensitive to union attitudes toward “merit shop” contractors (C.P. Exh. 1), the dynamics of what had already transpired would lead Defferding to a single concern; namely, that Hansen was in league with other union members present on that occasion. In contrast with Defferding’s testimony, it is more likely that he would assume that Hansen was part of the conspiracy, and that he was hired out of desperation, on hope that he could be controlled.

of Local 292 for 28 years and a licensed electrician for about 18 years. He was not a paid union organizer, and apparently did not serve the Union in any official capacity. As indicated above, he was hired with knowledge of his union history as the last to be interviewed, and the only licensed electrician secured through Ameristaff’s Embassy Suites venture. Sager testified that they elected to give Hansen, who allegedly stated that he had a master’s license,³⁶ an opportunity to work. Hansen accepted at \$15 hourly and \$25 daily per diem.

Though interviewed and selected for hire by T & C officials, technically, Hansen was retained on Ameristaff’s payroll for referral to T & C’s Boise-Cascade job. (G.C. Exh. 5(b).) He worked on September 12-14. On this latter date, he was terminated when T & C cancelled its contract with Ameristaff, while declining to place Hansen on its payroll.³⁷

³⁶ I credit Hansen’s denial that he claimed master’s status. Sager testified that in Wisconsin, it was not unusual to find one with a master’s license willing to work for \$16 hourly. Consistent therewith, Defferding testified that Hansen was given T & C’s \$16 rate for master electricians at the interview. This is inconsistent with the \$15 rate documented in G.C. Exh. 5(b), the employment contract between Hansen and Ameristaff. Moreover, Buelow corroborates that Hansen was initially assigned a \$15 rate, that was later increased to \$16, the rate reflected in Hansen’s paycheck. It is also noted that in his employment application, dated September 7, Hansen fails to represent that he held a master’s license. G.C. Exh. 5(b).

³⁷ By letter of that date, the Union notified T & C that Hansen was a member of Local 292. G.C. Exh. 5(a). The return receipt reflects that it was not delivered to T & C until September 21. R. Exh. 3. T & C replied to the Union by letter of September 21, denying that Hansen had ever been employed

As indicated above, Ameristaff's relationship with Hansen appeared to be a paper transaction, with T & C providing sole supervision, and Ameristaff having no discretionary role in his discharge. T & C's key players in the elimination of Hansen were Sager, Defferding, and Rodney Smithback, T & C's project superintendent. However, Smithback was the sole T & C functionary with day-to-day supervisory authority at the Boise-Cascade site. His testimony, with support from T & C employees Randy Reinders, Tom Steiner, and Michael Grow, is critical to the effort on the part of the defense to impeach Hansen's performance on that job, so as to confirm that union considerations where [*sic*] not involved.

The General Counsel's contention that Hansen was terminated on proscribed grounds centers on undisputed testimony that, during his brief 3-day tenure, Hansen flaunted his union membership, while engaging in overt, repetitive efforts to organize coworkers. Before announcing his intentions in that regard, T & C, on Tuesday, September 12, increased his wages and per diem. He was gone 2 days later.

Under the complaint, the organizational activity had a contumacious flair, since manifested by Hansen in the face of alleged instructions that he cease all union activity. These instructions are among a series of independent 8(a)(1) allegations naming Smithback as having told Hansen not to discuss the Union on the job, on the jobsite, or off the job; as having threatened discharge for organizing on the jobsite, and as having questioned Hansen as to what it would

by it, naming Ameristaff as his employer. The letter is cumulative as Hansen's union sympathy, and T & C's knowledge thereof is a given.

take to get him to quit discussing unions and to support the Company. The General Counsel implicates Ron Sager in this coercive pattern through allegation that he too prohibited Hansen from discussing or engaging in union activity.

b. *Hansen's employment at Boise Cascade*

On Friday, September 8, Hansen called T & C, speaking with Sager. He at that time was given directions to the "Arrowhead Lodge" in International Falls.³⁸

T & C's onsite personnel at Boise Cascade during Hansen's tenure was limited to Project Superintendent Smithback, Tom Steiner, a 25-year-old apprentice, who had never worked outside of Wisconsin for T & C, Randy Reinders, a 29-year-old journeyman electrician unlicensed in Minnesota, and Mike Grow, a helper on T & C's payroll. Much of the testimony focused on Hansen's 3-day tenure, with the General Counsel

³⁸ Smithback testified that he actually gave the directions to Hansen on this date, while telling him that he would have to provide, "on his own," safety glasses with side shields, hard hat, and safety shoes. He adds that at a safety meeting on Monday, September 11, attended by Hansen, the Boise-Cascade requirement that these items be worn at all times was mentioned repeatedly. Defferding testified that, when hired, Hansen was told that he was required to wear steel-toed shoes. It is a fact that Hansen did not arrive at the jobsite with safety shoes, and circumstances precluded his obtaining them until his last day on the job. In contrast with Smithback and Defferding, Hansen testified that before reporting, he was told to bring his tools and a hammer drill if he had one, but not safety shoes. Although the testimony dealt with Hansen's compliance with safety standards, Sager admitted that this did not contribute to T & C's decision not to place Hansen on its payroll.

stressing his union activity and the Respondent's reaction thereto, and T & C attempting to discredit Hansen's competence as well as performance during this period. My findings in this connection are summarized below.

Tuesday, September 12. This was T & C's first day on the job. According to Smithback, the crew arrived later than intended. After the unloading of tools, another delay was encountered because Boise Cascade had not laid out the materials as promised.

Around noon, State Inspectors Bob Johnsen and Gordon Oslin met with Smithback in the crew's presence.³⁹ Smithback was informed by the inspectors that T & C was in violation of Minnesota restriction on crew ratios. Thus, in addition to Smithback, there were three T & C employees, plus Hansen on the job. This offended Minnesota law by exceeding the required ratio of licensed to unlicensed personnel. Johnsen stated that because Hansen was the only licensed journeyman, two others would have to be removed. To comply, Smithback agreed that he would perform no electrical work, while electing to remove Mike Grow.

A dispute exists as to whether the investigators were informed that Hansen was employed by a Ameristaff and not by T & C. Thus, T & C's witnesses claim that Hansen reported this at that time. For

³⁹ Smithback testified that he was involved in a meeting and when he returned to the work area "around noon or shortly after," he was notified that the inspectors were present. Tom Steiner apparently did not agree. He described a great deal of work as having been performed prior to the arrival of the inspectors. He claims that they did not appear until late afternoon.

example, according to Smithback, Hansen told the investigators:

I don't think that Town and Country is legally working because I don't work for them. I work for a temporary company Ameristaff and I don't think they can be here doing that.⁴⁰

In response, Johnsen, according to Smithback, indicated that the inspectors were not sure of the ruling covering that situation, and therefore would let the job progress, but that the circumstances were strange and the job would be watched closely.

Hansen denied having mentioned Ameristaff at that time. In fact he asserts that Smithback described him to the inspectors as an employee of T & C. Inspector Johnsen, an apparently disinterested witness, corroborated Hansen. He testified that Smithback identified himself as the T & C representative on the job, and that when Johnsen inquired as to whether those on the job, including two apprentices, were his employees, Smithback responded, "Yes, they are. Mr. Malcolm Hansen is the journeyman in our employment." Contrary to T & C's witnesses,⁴¹ Johnsen de-

⁴⁰ Mike Grow, Randy Reinders, and Tom Steiner would later corroborate Smithback in this regard. Steiner testified that Smithback said he would check to confirm Hansen's position re Ameristaff. Grow, Reinders, and Steiner, virtually at every turn, offered choral corroboration of Smithback's testimony. The improbability of their testimony at this juncture foreshadows inherently questionable accounts in other significant areas. I considered them to be thoroughly unconvincing.

⁴¹ Smithback and Mike Grow denied telling the inspectors that Hansen was employed by T & C. Reinders testified that Smithback told the inspectors that Hansen was employed by Ameristaff.

nied that Hansen referred to his employment with Ameristaff at that time.⁴²

On departure of the inspectors, Hansen advised Smithback as follows:

Well, it looks like I'm pretty important guy on the job right now. If only two people can work and it's going to be on my license under my direction, looks like should have a little more money.

⁴² I credit Hansen and Johnsen. Apart from the latter's disinterest, I find support for their accounts in testimony by Sager that he did not learn that there was a question concerning the use of "temporary" or third party employees on the Boise-Cascade job until much later when he received a message from Robert C. Stephenson, T & C's vice president. However, Sager and Smithback confirm that they participated in a telephone conversation on the heels of the conference with the inspectors. If the agency issue had been broached to the inspectors, Smithback certainly would have been mentioned this to Sager. If Hansen was right, Ameristaff's involvement was far more critical than other topics discussed with the inspectors. In that event, T & C would have to terminate operations until a qualified journeyman could be hired and placed on its payroll. I also have doubts that, if aware of Ameristaff's involvement, the inspectors, as Smithback indicates, would not have known its legal ramifications. John Quinn, the executive secretary of the Minnesota State Board of Electricity, testified, without contradiction, that he informed Stephenson on September 11, that he had "advance notice" that T & C planned on hiring through an employment agency, and that Stephenson was informed that this arrangement would be unacceptable. Smithback's testimony that the inspectors were not of a similar mind assumes a possible, but unlikely lack of communication between electrical board headquarters and the electrical board's field personnel. It is more likely that, as Johnsen testified, Hansen was identified as a T & C employee, thus obviating discussion of the agency issue.

Smithback then apparently contacted Sager, who in turn spoke with Hansen. According to Hansen in their ensuing conversation, he sought an increase and eventually settled on an offer of \$17 hourly and an increase in per diem to \$32. With the exception of the size of the increase, Sager does not seriously dispute the content of this conversation.

Later that day, during break, Steiner asked Hansen how much he was making on the job. Hansen told him that he earned more than Smithback, also informing Steiner that "at home," he customarily earned \$25.70 an hour. In response, Steiner asked what Hansen was doing at International Falls. Hansen stated that he could not disclose at that time, but would tell him before leaving the job.⁴³ According to Hansen, Smithback who heard and was unhappy with Hansen's remarks, allegedly instructed: "I don't want you talking about unions on the job, at the cabin or anything. I don't want Steiner and Reinders to hear it. I just

⁴³ Steiner testified that the only time Hansen mentioned his earnings was when he said that "he was making more than T & C was giving him." When Steiner asked how much, Hansen declined to tell him. Steiner was a thoroughly unreliable witness, whose testimony struck as a pat, finely honed attempt to place meat on the bones of Respondent's case, whenever he could and with repeated exaggeration and disregard for truth. Reinders testified that the only reference to wages that he was aware of grew from Hansen's discussion of differences between his earnings on union jobs and at Boise Cascade. As for Grow, on his inquiry as to how Hansen could afford to lose money by working for T & C, Hansen denied that this was the case, indicating that his hourly rate was being subsidized by the Union. I believed Hansen in this respect.

don't want to hear it. That's it." Hansen stated that he would not comply.⁴⁴

Sager testified that on the afternoon of September 12, he received a call from Smithback who was unhappy with the fact that Hansen was telling the other workers on the job that he earned more than Smithback. Sager suggested that the latter call Defferding, while indicating that he should avoid upsetting Hansen because he was needed. Sager added that Hansen had a gun at their head, requiring respect for his demands.

On September 12, the curtain was lifted on the attempt by T & C's witnesses to portray Hansen as a poor worker, who failed to demonstrate that he possessed craftsmenlike skills. Smithback admitted that he had no direct opportunity to evaluate Hansen's work that day. He did testify, however, that he was "a little surprised at the amount of work that they didn't get done on the 12th."⁴⁵ He added that:

[B]oth Tom Steiner and Randy Reinders came up to me and asked me specifically if I could find something for Mick to do, so they could get some

⁴⁴ In this instance, I believe that Hansen was mistaken. Although I have no doubt that such a remark was made by Smithback during Hansen's employment, Tuesday was a bit early. It was not until Wednesday that Hansen announced his intention to organize. Prior to that, his references to union activity were general, oblique, and ambiguous, and in the circumstances would not have prompted the strong admonition attributed to Smithback.

⁴⁵ In the face of Smithback's admission as to the late start that morning, it is of interest that Reinders testified that after the inspectors left, not much work got done because of the dialogue that ensued in consequence of Hansen's claims for more money and authority based on the licensing problem.

work done. He was interrupting them, consistently talking, would not allow them to proceed in a fashion to which they were accustomed to working.

[A]s they set up a scaffold, placed pipe on it and then were about to take clamps to the top of the scaffold with them . . . and then proceed to run the conduit[,] . . . Mick would not allow them to take the clamps up because then he would have nothing to do [if] he couldn't throw the clamps up to them.

So he took essentially a two man job and made it into a three man job and in the process—they complained about he talked an awful lot.

Steiner's testimony was more far reaching than Smithback's summation. His criticism appeared to highlight malfeasance, rather than nonfeasance. He testified that, together with Reinders, on Tuesday, he was running conduit, above ground on scaffolding, as Hansen, at ground level bent pipe for them. When asked to evaluate Hansen's work in that regard, Steiner stated that he could have done a better job as Hansen's bends were not in accord with measurements, and had skewed angulation. Steiner claims that he rebent some of the pipe. Steiner also testified that an offset made by Hansen was not right, and that from his observation, Hansen lacked familiarity with the machine, a conclusion deduced from his use of angulation charts to discern multipliers used to effect bends of different degrees.

Steiner also testified that the crew was cutting strut, a "U" shaped channel to be anchored to a wall designed to hold conduit. Steiner asserts that the cuts, made on the portaband saw, were not straight,

and that most of the cutting was performed by Hansen. He also claims that he observed Hansen, rocking the band saw, a practice which could break the blades, and instructed him as to the proper technique. With Hansen being the primary operator of the band saw, they went through six blades in 3 days. In addition, Hansen and Steiner had to recut struts.

Steiner testified that late in the day, the crew resumed hanging strut on the wall. He had Hansen cut a strut for a "disconnect" which ended up shorter than the measurements Steiner had provided. Reinders confirmed that this short length was pursuant to a measurement originally made by Steiner, then re-measured by Hansen.⁴⁶

If Steiner is to be believed blades were not the only tools ruined by Hansen that day. He related that the latter in drilling holes in the struts, spurned the use of a "center punch" as a starter, using a larger bit, forcing the drill, at high speeds, directly on the metal. This allegedly caused the drill bits to dull rapidly. Hansen allegedly burned up every available drill bit by the end of the first day.⁴⁷

⁴⁶ The attack on Hansen's competence included reference to the latter's position that bent conduit was subject to appropriate measure either on a top-to-top or bottom-to-bottom basis. Steiner with initial agreement from Reinders stated that this was in error as the accurate measurement could only be made from top to top. Reinders, on cross-examination was forced to concede that it made no difference, as the top would become the bottom simply by turning the offset pipe upside down.

⁴⁷ Reinders claims that he attempted on Tuesday to correct Hansen's method of handling the drill. Hansen, however, denied this, pointing out that it was his practice, and for years, had carried his own personal drill bit for use on this, and all other jobs on which he was employed.

Steiner did confirm that, among the above-described tasks performed by Hansen that day, he insisted on feeding clamps to Steiner and Reinders as they worked on the scaffolding. The box of clamps were not placed on the scaffolding before hand, because, precisely as Smithback had related, Hansen needed something to do.⁴⁸ When examined further on this point, Steiner offered that Hansen really preferred this task to other work that he might have done. Steiner ultimately agreed that the accumulation of too many parts and tools on scaffolding would tend to create a safety hazard.

Reinders also spoke to Smithback that day, reporting that the drill bits were shot, and that they had broken so many band saw blades that only one remained. In fact, Mike Grow was sent to the hardware store to purchase additional blades that Tuesday afternoon. On cross-examination, he admitted that two portabands were on the job and that both were used regularly, frequently and by "everybody."

Smithback testified that he called headquarters late in the day to report that he was not pleased with Hansen's performance and that he was not meeting expectations as "he was unsatisfactory, his performance was unsatisfactory." Smithback claims that, on September 12, he made an entry on the daily foreman's diary citing Hansen with work that "does not come close to being satisfactory in the production

⁴⁸ As noted in T & C's posthearing brief, Hansen, in addition to feeding the clamps, would pass conduit to the men as they worked on the scaffolding, and move it for them as their work progressed.

end." There was no reference to damaged materials, tools, or parts. (R. Exh. 12(a).)⁴⁹

Wednesday, September 13. Apart from the assault on Hansen's competence, testimony as to events of this day includes Hansen's account concerning the emergence of the Ameristaff issue and evidence that this was the first occasion on which Hansen announced specifically his aims on behalf of the IBEW.

First, Hansen testified that in the morning, Area Inspector Gosland approached him on the jobsite requesting that he identify his employer. Hansen, in Smithback's presence, replied: "Well, I'm not positive who I work for. I filled out an application with Ameristaff, but I'm working with the guys here from Town & Country and I use Town & Country's tools and Town & Country employees are . . . working off my license." According to Hansen, Smithback in-

⁴⁹ Smithback relates that were it not for the licensing problem, Hansen would have removed from the job at this point. This is taken as a remarkably strong statement after only a partial days work and by one who claimed no opportunity directly to observe Hansen. Moreover, the diary entry itself is questionable. It appears inappropriately placed, lending support to the possibility that it was entered after the fact, as argued by proponents of the complaint. In any event, the entry makes no reference to the quality of Hansen's performance. This omission is striking when considered in light of Steiner and Reinders' accounts of destroyed drill bits and saw blades due to poor work practices, as well as his alleged output of fouled parts, requiring partial rework. Consistent with Tuesday's variance, entries in the diary for the balance of that week dwell exclusively on productivity, with not a single mention of Hansen's failure to perform in a workman-like manner.

formed Gosland that Hansen was working for T&C.⁵⁰

Later, during an afternoon break, Hansen announced, for the first time, that he was on the project to organize for the Union. Smithback, Steiner, and Reinders were present. According to Hansen, at that point, Smithback leaped to his feet, stating, "Jesus Christ, I don't need that. I don't want you talking about unions anymore. I got to call the office and talk to Ron Sager." Smithback then went into the office. Smithback admits that Hansen made this announcement, but he testified to saying nothing before seeking guidance from headquarters.

According to Hansen, Smithback later returned, advising Hansen, in the presence of Steiner and two Boise Cascade employees (Everett Hall and Dennis Moran) as follows:

⁵⁰ According to Sager, he did not learn that there was a question concerning the use of temporary employees on the Boise-Cascade job until Tuesday, following the pay raise conversation with Hansen. The source was a cryptic message from Bob Stephenson. Sager first places this as having occurred that "morning," but later would testify that this message was not received until 4:30 p.m. In this connection, it is noteworthy that John Quinn, the state electrical official, testified that when, on September 11, he instructed Stephenson not to use a labor service, Stephenson indicated that adherence would be no problem. Quinn added that, in his presence, Stephenson telephoned his office, overhearing Stephenson instruct that "they could not use an employment service for contract labor, and that should be taken care of." (This was memorialized by Quinn's letter to Stephenson dated October 18. G.C. Exh. 12.) According to Sager, he did not actually talk to Stephenson until Wednesday, September 13, whereupon Stephenson reported that Quinn had advised that they could not use temporary employees on any jobsite in Minnesota.

I just talked to Ron Sager over at Appleton, and I don't want you talking about the union. Ron Sager doesn't want you talking about the union. Boise Cascade doesn't want you talking about the union, and if you don't quit talking about the union, I'm going to fire you.

Hansen replied, "That could be, but I'm not going to stop talking about the Union."

Sager concedes that at some point that day, Smithback called, reporting that Hansen was engaged in union activity. Sager claims that he instructed Smithback that he could not restrict Hansen from doing this on his own time, but, if while working, he is talking to excess on any topic, Smithback was free to appeal for a little less talk and a little more work.

Consistent therewith, Smithback testified that he then approached Hansen telling him "please talk less and do more work."

Parenthetically, it is noted that Sager relates that he had received an earlier phone call that morning from Smithback who reported that Hansen was wandering around and not being very productive. Sager told Smithback that at this point they had to make decisions at headquarters, and for him to just keep his eye on the situation. Smithback averred that he was told in that conversation "there's not a lot you can do." He claims that they asked if Hansen was working steady, whereupon Smithback replied, 'No, he talks a lot.'⁵¹ Smithback states that

⁵¹ If Smithback had made the report he claims to have made on Tuesday evening, this exchange would have been old news and repetitive.

he was told that all he could do "is ask him to talk less and work more." However, Smithback claims that he was admonished that Hansen could talk about anything he wished as long as it doesn't interfere with the work.

According to Hansen, at Smithback's urging, he telephoned Sager, who allegedly stated:

I don't want you talking about the union. . . . Boise Cascade won't allow us to talk about the union. I don't want you talking about it. I don't want you talking about anything but the job. I don't want you talking about church. I don't want you talking about gambling. I don't want you talking about anything but work. Now go get Smithback and tell him to call me.

Sager agrees that this conversation took place. He claims, however, that he informed Hansen that Smithback had reported that his productivity was under question and that he didn't have safety shoes as required. An incident involving a hard hat was also mentioned. Hansen allegedly grew angry, hanging up the phone.⁵²

Of major significance to the above conflict is a concession by Sager that on either Wednesday or Thursday, or both, he possibly had two conversations with Hansen concerning Hansen's declaration: "I'm going to not stop talking about the union."⁵³ Sager alleges that he reacted as follows:

⁵² Here again, the criticism did not include references to the broken tools and scrapped parts, or the basic charge of "poor workmanship" attributed to Hansen by Steiner and Reinders.

⁵³ Smithback testified that Hansen had also made a comment to him on Thursday morning suggesting that Hansen

I don't care what you talk about as long as it's on your own personal time, if it interferes with your work, that's another story . . . you can talk about anything you want . . . on your breaks, your noon hours, your own personal time before work, after work, at the lodge, whatever, but you can't talk about it on your work time, if it interferes with your work. . . . same way if you were talking about baseball or hunting or fishing, religion, politics, telling a joke whatever.

The General Counsel in this respect raises the question as to why Hansen would repeatedly assert his intention to persist in union activity, if Sager and Smithback's constraints did not extend beyond the project and did not reach nonworking time. After all, Hansen lived, slept, ate, drove to and from work with T & C's employees and had ample access to them. Sager's admission concerning Hansen's expressed intention to pursue organization is more compatible with the total restraint, then the limited one suggested in his own, and the testimony of Smithback.

In a further incident, as the men were returning from work that day, Hansen relates that Smithback, in presence of either Steiner or Reinders, complimented his work, asking him how much it would take to get him to "jump ship and come over to our side." When asked what he meant by that, Smith-

was under the impression that he was subject to a broad ban on union activity. Thus, he testified that, at that time, Hansen asked where Smithback got the idea that the Union could not be discussed on mill property.

back said, "Get up off your union activity and come to work for us." Hansen grinned and said, "I don't think you have enough money." When they arrived at the cabin, Smithback repeated that Hansen was not to discuss the Union as he was tired of hearing it and did not want the others to hear it.

In addition to denying all 8(a)(1) conduct attributed to him by the complaint, Smithback was sharply critical of Hansen's performance this day. First he states that his other electricians complained that Hansen was rough with the manual and power tools. In one instance, Tom Steiner accused Hansen of breaking five blades on a portable band saw due to improper use. He allegedly broke most of the drill bits T & C had at the site. Smithback claims that he personally observed Hansen reject proper practice by using a hammer to bang a piece of pipe into a clamp on a "rigid 300 mule machine."

In addition to the foregoing, Smithback states that:

Throughout the day on Wednesday I did notice that he was speaking with people an extraordinary large amount of time. He tended to have coffee with the [T & C] crew and then coffee with the mill crew and he would talk to the guys and in his way [of] talking his personality would be forceful enough, he would more or less make it hard to work while he was talking to you.

. . . .

The rest of the guys were upset with the amount of productivity they had gotten done too, meaning Randy and Tom, because Mike was not present. They were both saying, "Man, we

should have been farther than this, we just can't get anything done. Everything Mick cuts he cuts crooked." They had to recut, rebend, redo, most everything he had done and—okay, he was talking Wednesday morning when I came in and Randy Reinders believe asked me a question about . . . how we were going to do it . . . and we were discussing what was to be done . . . and Mick came storming up and yelled at me "I thought we made it perfectly clear that I'm in charge of this group and that if you want to talk to anybody who's working, Randy or Tom, I had to talk through Mick," I could not talk to the guys on the crew.

Smithback summed up by stating:

On Wednesday, [Hansen's] performance was negligible, didn't really do much of anything but talk to people and disappear from the immediate site . . . for periods of time.

Steiner was pretty much in tune with Smithback in criticizing Hansen's performance on Wednesday. He avers that he, Reinders, and Hansen were installing struts, but that Hansen did not get a lot done, because he was talking to them about the Union. This, according to Steiner was irritating, distracting them from performing while listening to Hansen. Steiner also testified to another occasion when Hansen delayed his response to a request for help because engrossed in conversation with Boise Cascade employees. In broader terms, Steiner explained:

He wasn't there most of the time on Wednesday, I wouldn't say most of the time, but he wasn't there a lot of times, he was either going to the

bathroom—in fact one time Randy [Reinders] had gone to the bathroom and came back and I had to ask him if he had seen Malcolm and he said "no." And then we were waiting and waiting for him to com[e] back and then he came back and I guess he was talking to somebody from another . . . [contractor] or something like that.

Steiner also testified that on Wednesday morning, Smithback was apprised of Hansen's having broken drill bits, and therefore, in addition to his talking about the Union, and his absence from the work area, Smithback was alerted to specific allegations that would plainly demonstrate Hansen's faulty workmanship.

Reinders was also called to comment on Hansen's performance on Wednesday. Like Steiner, he accused Hansen of sitting around talking a lot that day with employees of Boise Cascade and other contractors on the job. His summary of this observation shows a remarkable resemblance to the testimony of Steiner:

On Wednesday, [Hansen's] performance was negligible, didn't really do much of anything but talk to people and disappear from the immediate site . . . for periods of time.

The subject of these conversations, according to Reinders, was union. Moreover, their disruptive effects was suggested by Reinders' testimony that he had to beckon Hansen to return to assist other members of the crew, and according to Reinders, Hansen performed work-related tasks only about 5 hours that day. He claims that he reported this, including the fact that unionization was among the topics, to Smithback, who attempted to correct Hansen merely

by telling him "he'd like to see a little more work and less talk."⁵⁴ According to Reinders, nothing else was said by Smithback.

Reinders would broaden the allegations of broken tools and parts to include Hansen's culpability in connection with the disabling of the "300 threading machine." Thus, Reinders testified that on Wednesday, Hansen was operating the 300 threading machine, when it became disabled. The damage to the machine caused misalignment of the teeth, which cut threading into the pipe. According to Smithback, on that very day, he personally observed Hansen hammering the jaws of the machine tight, instead of making the adjustment by hand.⁵⁵ This allegedly caused improper threading by tearing metal chunks from the machine, again causing rework. Reinders

⁵⁴ Reinders, who like the rest of T & C's witnesses struck as heavily biased and totally lacking in objectivity, first corrected himself when he initially placed this appeal on Wednesday, then twice stated that it occurred on Thursday morning. Apparently dissatisfied with this response, T & C's counsel inquired a third time. Apparently, Reinders got the message, for this time he went back to Wednesday, relating that these very words were used by Smithback to Hansen at that time.

⁵⁵ Reinders was less sure of the cause, and apparently did not observe Hansen take a hammer to the unit. When questioned as to the cause, he speculated: "Maybe the way he was forcing on the handle to get it started on the pipe might have had something to do with it." The "maybe" became accusation when Reinders clarified that Hansen was leaning into the handle, an unnecessary and improper way to operate that machine. However, on cross-examination, Reinders admitted that he did not know when the teeth broke off, and to further confuse his speculation, conceded that others had used the "300 threader" that week.

admits that Hansen fixed the machine himself, an effort which took a considerable amount of time.⁵⁶

T & C's posthearing brief includes a representation that on Wednesday, Steiner and Reinders reported their observations concerning Hansen's performance to Smithback. In his log for that day, Smithback simply stated:

Malcolm Hansen is a prolific talker. I wish I could channel the energy he puts into talking into productive work. All of his talking is slowing down the job.⁵⁷

Sager testified that he believed that on Wednesday, September 13, he called Buelow to report that Hansen was being evaluated for productivity and safety

⁵⁶ Hansen's problems on the "300 threader" apparently did not end on Wednesday. Steiner testified that on Thursday, Hansen was engaged on that machine cutting and threading short pieces of conduit for installation. The next day, after Hansen's departure, Steiner discovered that the conduit was cut to improper lengths and not properly threaded. Smithback claims that he learned on Thursday that, in preparing a particular component, Hansen was guilty of improper spacing of pipe connectors while cutting pipe of such erratic lengths as to require that some be redone. This went unmentioned in his diary for that day. Furthermore, it is my understanding from Smithback's testimony that this dereliction, if true, would not have been discovered until after Hansen's termination.

⁵⁷ The Respondent asserts that because Smithback had been told by Hansen, following the inspectors' visit that Hansen was in charge, Smithback did not discuss these deficiencies with Hansen. However, this so-called "licensing problem" did not prevent Smithback from admonishing Hansen to work more and talk less. Nor would this excuse his failure to list in the foreman's diary, the litany of other, more major offenses, which according to T & C, bordered on willful sabotage.

violations. Buelow testified that the only reason given him concerning termination of Hansen was T & C's inability to use Ameristaff or a temporary contractor. In any event of major concern, is the fact that Sager himself does not list faulty workmanship as among Hansen's alleged failings, an omission which consistently reemerges in documentation, and reasons expressed by Sager and Defferding for Hansen's demise.

Thursday, September 14. Hansen's final workday was highlighted by two incidents, the first occurring during the ride to work that morning, and the second during the noontime break. Several 8(a)(1) allegations are imputed to Smithback during these episodes, and an assertion by T & C that Hansen had caused "disharmony" within the crew, an important link in reconstructing the motive for the termination also appears to have found its genesis that day.

Hansen's union activity on Thursday opened that morning at the plant gates when Smithback's vehicle was confronted by pickets.⁵⁸ Hansen emerged from the truck to inform the pickets that he was crossing only to further union interests by organizing. Afterwards, as they entered the premises, Hansen claims that Smithback stated that he didn't want any more union talk, also inquiring if Hansen had thought over the offer to "jump Ship." When Hansen asked how much would be involved, Smithback referred him to Sager.⁵⁹

⁵⁸ The access to Boise Cascade was under interdict of union pickets, who apparently were protesting the presence of another nonunion contractor, B.E. & K. Construction. The latter was engaged in new construction at that site.

⁵⁹ As always, Smithback denied that he made any statement limiting union activity. However, he admits that at the time,

It is undisputed that Hansen did call Sager. At this time, he claims to have informed Sager of Smithback's sellout inquiry. Sager denied any interest in giving anything to persuade Hansen to abandon organization activity.⁶⁰ Sager then switched topics, turning to reports about Hansen's job performance. Sager charged that Hansen (1) refused to wear safety shoes,⁶¹ (2) worked without his hardhat,⁶² and (3) had a production problem. Hansen, who had not

Hansen told him "right then and there" that he had no intention of stopping talking union on the jobsite, while inquiring as to who told Smithback that he could not do so on Boise-Cascade property. Here again, the question emerges as to whether Hansen would have concocted or assumed such a constraint, while communicating both to Sager and Smithback that it would be ignored, if not instructed to refrain from union activity. In Smithback's case this declaration is even more curious, considering Smithback's sworn testimony that he had never mentioned to Hansen that the Union could not be discussed.

⁶⁰ Sager does not deny that this phone call was initiated by Hansen. While he denied making a bribery offer, he did not contradict Hansen's testimony that the matter was raised.

⁶¹ Smithback offered to take Hansen to the shoe store on three separate occasions. The first time the store was closed, the second, Smithback did not show up on the lunchbreak as he had promised, and the third time, on Thursday, the day of termination, the shoes were actually purchased. It is noted in this regard that Hansen was not permitted to drive his vehicle to and from the Boise-Cascade jobsite and therefore was dependent on Smithback for transportation during normal business hours.

⁶² According to Hansen, he had his hat off once on the entire job, and that was while having coffee, indoors at the desk of Everett Hall, and in presence of Denny Moran, both employees of Boise Cascade, who were also hatless.

previously been criticized, reacted, "that's Bullshit," arguing that Smithback was only concerned about union activity. Sager said he would call Hansen back that evening after discussing the situation with Defferding. However, according to Hansen, Sager again instructed Hansen to refrain from union activity.

During the noon recess, Hansen sought to convince the crew as to the merits of union organization. He avers that he then suggested that Bob Jensen, the business agent from Local 294, be contacted with the further observation that, if an election petition were filed, the men could be in the Union by Christmas. Smithback, according to Hansen, jumped up, and in the presence of Grow, Steiner, and Reinders attempted to silence Hansen, again stating that he did not want Hansen talking to the men about the Union on the road, at the cabin, or on the job. Hansen then replied that he thought it would be good if Jensen came out and "we'd have a little meeting and petition for an election." Grow said that the meeting would be held at the bottom of the lake, asking Hansen if he had good anchors.

Smithback relates that just prior to this noontime meeting Reinders and Steiner were complaining at the means used by Hansen in soliciting them to sign with the Union.⁶³ He described Reinders as so upset, he had packed his bags, threatening to leave the project. Grow, who had just returned was so upset he was shaking, and as Hansen continued to talk to him about the Union. Grow asked what it would take for Hansen to drop the Union and come over to T & C.

⁶³ Hansen testified that he never possessed authorization cards on this jobsite.

Hansen, according to Smithback, continued pushing "little white cards for them to sign." The men reacted: "we're just not interested in the union." Grow related that when Hansen brought out the cards, he rebuffed: "you don't understand, I'm not interested, can't you get that through your head." Steiner and Reinders chimed in that Grow was speaking for them as well. Steiner confirmed that Hansen "just kept on going." At this juncture, Hansen allegedly stated, "No, I will not stop talking bout the union." Grow testified, with support from Smithback, Reinders, and Steiner that he then asked Hansen why he doesn't give up on the Union and come over to T & C.

Against, this background of resistance, according to T & C, Hansen sat back, quietly, stating "I've got an idea, let's take a vote right now." At this point, because Reinders was upset, Smithback intervened, admittedly stating "Hey guys, before you answer that, I would really rather that you talk about something else, fishing or something." Nonetheless, Hansen suggested that the men take a vote, whereupon Smithback stated, "I'd rather we not take a vote." At that point, the conversation ended. However, as Steiner testified, Reinders grew nervous. He left to call his wife, a habit he developed when stressed. According to Smithback, after 20 minutes, Reinders returned telling Smithback that "if this thing is not settled today, I'm going home tonight."

Reinders testified that the [sic] was upset to the point of violence in consequence of Hansen's actions during the lunchtime incident. He described the provocation as follows:

We were trying to get work done and he kept bring it [the Union] up and it didn't stop and we were sitting there eating lunch and the feeling that I got was like he sorta felt like he was losing his battle organizing us because no matter how many times he asked us, we'd tell him no. We're not interested.

We'd tell him that individually even as a group when we were all there, we'd tell him "no," but he just kept at it and kept at it.

.....

And while we were sitting there at lunch, Malcolm was sitting . . . directly across from me and he had a way of starting these stories no matter if it was about his mother or his father or his friends and it would end up as a reason why we should join the union.

.....

And at lunch it was like he was grasping for straws. We're sitting . . . and he's pulling stuff out of his wallet, he's got cards you know, why don't you take a look at this, it's a card to sign you up for the union . . . he had a picture card . . . referring to him as a union organizer. And he's pulling out all these receipts for union dues . . . and he just kept—why don't you look at it, why don't you take a look at it.

If you want, tonight we'll go down to the Flame and see the woman dancers, have a few beers. I got my friend, he'll come up and we'll get you signed up right now.

Reinders claims that he had "enough of his pushing information on me." In fact, Reinders was provoked to the point of being ready to "rap . . . [Hansen]

right up side the head," thus, freely admitting that he was ready to punch Hansen because of his repetitious efforts to solicit on behalf of the Union.⁶⁴ As others had testified, Reinders called his wife, telling her, "if things didn't improve real quick, I was coming home. . . . I wasn't going to put up with it anymore."⁶⁵

After the noontime incident, Sager's earlier criticism of Hansen provoked a confrontation between Hansen and Smithback. Thus, in the presence possibly of Denny Moran and Everett Hall, both employed

⁶⁴ Reinders justified his reaction by describing an experience in which he was roughed up when he declined to join a union during an organization campaign in California. Reinders admits that he previously mentioned this experience to Hansen, who indicated that his people "weren't that way, they didn't beat up on people and . . . it was his policy to be up front and honest and they are not violent people." Despite this, and although Hansen had engaged in no untoward conduct on his own, Reinders testified that he was suspicious as to what he might do. However, later that afternoon, having been calmed down by Smithback, Reinders testified that he called on Hansen to tell him that he was the best organizer "I've ever come up against." Hansen replied that there was no hard feelings against any of the crew, and that they were "some great guys." Reinders also expressed that Hansen had a lot of guts staying in the cabin with the others after announcing he was a union organizer.

⁶⁵ Reinder's edginess about Boise Cascade might well have been influenced by factors totally unrelated to unionization or Hansen. A young man of 25, he had been married only 7 months. He had an infant daughter. He received only 2 days' notice of his Boise-Cascade assignment, a 10-hour drive from his home in Oshkosh. This was his first job for T & C outside Wisconsin, and in the past, he had routinely commuted to projects spending nights at home. Admittedly, his wife was not thrilled with this development.

by Boise Cascade.⁶⁶ Hansen relates that the following ensued:

I said to Rod, "I understand you are not satisfied with my work." I said to Denny Moran and Everett Hall, "Are you satisfied with my work?" [They replied] "Oh we're satisfied. We're satisfied with all you people's work." Smithback said, "Well, you don't have to worry about [it] if they're satisfied. It's me, and I was only dissatisfied on Tuesday morning.

According to Hansen, Smithback used that occasion once more to instruct him not to talk "about the union or anything else."⁶⁷

Smithback, according to Hansen, backed off, immediately telephoning Sager stating, "Ron, that was bullshit about Mickey's production. . . Steiner and Reinders were setting the pace and he was moving the scaffolding for them and handing out material."⁶⁸ However, Hansen was then called to the phone, whereupon Sager instructed him to call Buelow over at Ameristaff. He did, with Buelow, stating as follows:

⁶⁶ Reinders, Steiner, and possibly Mike Grow were also present.

⁶⁷ Smithback admits that Hansen accused him of lying on the productivity question, demanding that he call Sager back immediately to straighten out the issue. Smithback claims that he argued back that his criticism was valid and there was nothing to straighten out. Smithback does not aver that Hansen was ever informed of the other alleged discrepancies in his job performance.

⁶⁸ Sager denied having received any such report. He could not recall whether Smithback had told him that Hansen's productivity problem was limited to the above incident.

Mickey . . . we got a little flapdo. The State Board of Electricity won't let me hire people from Minnesota to work as an electrician because we haven't got a license so I guess whatever contract I have with you has been done.

When Hansen inquired as to whether T & C would pick him up on its payroll, Buelow told him to call Sager.

Hansen then called Sager, asking if he would be working directly for T & C. He was told "absolutely not." Hansen claims that he was never given any reason for T & C's refusal to hire him, a fact or facts, which Hansen states remain unknown to him. Sager disputes this, but claims to have described unimproved "low productivity" as the sole cause.

c. Analysis

The issue here is limited to examination of T & C's grounds for refusing to retain Hansen on its payroll.⁶⁹ T & C's termination of its agency contract with Ameristaff, was impelled by Minnesota law, and

⁶⁹ The fact that Hansen took this job to further organizational interests is of no comfort to T & C. Hansen was a rank-and-file union member, who served that body in no official capacity. From all appearances, he was dependent financially on employment as a journeyman electrician in the construction industry. The fact that, in connection with his employment at the Boise-Cascade site, he was reimbursed by the Union for wage and benefit differentials does not place him in the category of the paid union organizer whose eligibility for a Board remedy was considered in *H. B. Zachry Co.*, 289 NLRB 838 (1988), enf. denied 886 F.2d 70 (4th Cir. 1989). Thus, that case is plainly distinguishable, and Hansen's intention to organize was not incompatible with his basic employment needs and objectives and did not debar him from statutory protection. See, e.g., *Circo Resorts*, 244 NLRB 880, 887 (1979), enfd. as modified 646 F.2d 403 (9th Cir. 1981).

was plainly legitimate. However, the purity of motive underlying this transaction did not carry over, ipso facto, to justify the refusal by T & C to employ Hansen on a direct basis. As of September 14, T & C still could not operate at Boise Cascade unless its direct payroll included a locally licensed electrician.⁷⁰ Moreover, although Sager testified that temporary agency employees are made permanent only 5 to 10 percent of the time,⁷¹ common sense dictates that the temporary will always be retained if he is available, competent, needed on an ongoing job commitment, and where agency commissions considered against other factors will not make that an unprofitable decision. Thus, for purposes of this proceeding the motive underlying its failure to utilize Hansen is determinative of the 8(a)(3) and (1) allegations.

Economic reality neutralizes any debate concerning T & C's posture with respect to union organization. As a merit shop employer, it is dedicated to a method of operation in the highly competitive construction industry which is not compatible with wage and benefit standards sanctioned by affiliated craft unions such as the IBEW.⁷² (C.P. Exh. 1.) There is

⁷⁰ In this light, it is understandable that Buelow, on being informed of Ameristaff's termination, instinctively went to the trouble of preparing paper work facilitating Hansen's transfer to the payroll of T & C.

⁷¹ T & C observes that it had never retained an agency employee on its payroll after a mere 3 days' employment. However, it was previously unaware of Minnesota licensing constraints and there is no evidence that T & C was ever before in a position where continuation of a project depended on such action.

⁷² Testimony on behalf of T & C that union affiliation was a matter of no concern to the interviewers was so out of

no real dispute that on the second day of his employment, Hansen announced that he was a union organizer, and persisted in organizing on behalf of that Union. On the heels of these purely verbal and non-coercive efforts, Sager testified that he became convinced that a decision had to be made on Hansen's status when he received reports that employees were offended, claiming harassment and low morale. Finally, Sager admits that, as of September 14, when T & C declined to put Hansen on its payroll, at least two licensed electricians were needed to discharge its responsibilities on the Boise-Cascade job. It, thus, appears that the elimination of Hansen took priority over the risk that the job would be shut down for lack of a licensed electrician.

The foregoing is sufficient to give rise to the inference that union activity was at least part of the motive for Respondent T & C's failure to place Hansen on its payroll, thus, in accord with *Wright Line*, supra, placing the onus on T & C to demonstrate that this would have taken place even in the absence of Section 7 activity.⁷³ T & C's numerous witnesses

comport with economic realities as to raise question as to what else the defense might expect me to believe. This reaction was hardly allayed by the observation by T & C's attorney that "T & C's only concern with an applicant's union membership was that the applicant might be fined for coming to work for T & C."

⁷³ The claim of discrimination is bolstered by Hansen's testimony that the effort to discourage his union involvement was the subject of a variety of independent 8(a)(1) violations. Thus, he testified that Smithback repeatedly stated that he could not engage in union activity anywhere, and threatened termination if he did so. Smithback, with cor-

attempted to substantiate that Hansen was a poor worker, who failed to meet productivity standards, and who failed to perform in a craftsmenlike manner. Its evidentiary case was shifting, replete with contradiction, and in the end, furnished a strong suggestion that union activity played an important role in its decision not to retain Hansen. In sum, the defense is structured upon a composite of lies made possible through T & C's access to a willing combination of highly biased witnesses.

Those responsible for eliminating Hansen allegedly acted on reports from Smithback, who in large measure was dependent on reports from Steiner and

roboration from the T & C employees, denied that this was true. In fact he denied ever mentioning the Union in his attempts to curtail Hansen's loquaciousness. This despite, an awareness that the other crew members had told Hansen during breaks that they did not want to discuss the Union, and his admission to a strong feeling that Hansen was wrong in continually pushing the Union on them in these circumstances. Hansen is preferred over claims that Smithback resisted the temptation of bringing Hansen under control. Based on Hansen's testimony, I find that Smithback, on his own, attempted unlawfully to interdict Hansen's union activity in these particulars, but also inquired as to whether Hansen could be bribed to cease his organizational efforts. Yet, at the same time, I did not believe Hansen's attempts to implicate Sager in a prohibition on union activity. Thus, Hansen testified that in two, separate telephone conversations with Sager, the latter instructed him not to talk about the Union. Sager denied having made the statements. In context, it was unlikely that Sager would have made these remarks, considering what was known about Hansen at the time of his hire, and after he had announced organization as his goal. I credit Sager, and shall dismiss the 8(a)(1) allegation involved.

Reinders.⁷⁴ However, the indictment of Hansen by Steiner and Reinders apparently lacked the attention it deserved. Thus, Smithback, according to T & C's witnesses, was advised on Tuesday of the incidents involving Hansen's responsibility for the broken band saw, the improper bending of pipe, the cutting of struts to erroneous lengths, and misconceptions about how pipe should be measured, all serious discrepancies. Smithback, who claims that, but for the licensing problem, he would have terminated Hansen that first day, executed a diary entry for that day which indicts Hansen with flawed "production," but says nothing about poor quality of work. Steiner, the next day, added Hansen's predilection to break drill bits to the list of quality infractions, reporting this as well to Smithback. The latter's diary for that date is critical of Hansen, but solely on the basis of excessive "talking." No reference is made to a continuing propensity to mishandle and damage tools or to produce bad parts. The pattern continued on Thursday. Steiner and Reinders once more accused

⁷⁴ Steiner, an apprentice, and Reinders, a journeyman, who could not qualify to take the Minnesota licensing exam because for lack of creditable experience, laid the foundation for the attack on Hansen's workmanship. Hansen is an experienced journeyman with many years in the trade. His employment record does not suggest either a lack of competence or that he was prone to be inefficient. In my opinion, where possible, Hansen provided well reasoned explanation as to the erroneous nature of assumptions underlying the accusations of these young men, still in their twenties. My mistrust of Steiner and Reinders was sufficiently deep as to warrant rejection of their testimony in areas which were totally subjective and incapable of refutation by Hansen, and for that reason, beyond his ability to register clear and straightforward denials.

Hansen of faulty work methods on that day, yet Smithback's diary entry did not stray from the familiar:

Malcolm Hanson did improve the quantity of work he did today. Still not up to our expectations. And he still spends much time B.S.ing with mill employees and w/our employees.

Smithback, while testifying under oath, possessed a clear grasp of the bad parts, tool breakage, and abuse of equipment described by Steiner and Reinders. It is difficult to understand why these breakdowns in Hansen's craftsmanship were given so little attention at the time. The offenses were specific. They reflected serious failures in craftsmanship. They were reported in timely fashion. Yet, the objective trial does not lead to any suggestion that, by September 14, quality had become an element of T & C's case against Hansen.

Like the diary notes, higher management did not seem to dwell on the quality of Sager's performance. Sager and Defferding concentrated on productivity, describing "disharmony" as a triggering event.⁷⁵

⁷⁵ Neither Defferding, nor Sager indicated that they were aware that Hansen had abused or misused tools or equipment. Defferding assertedly received daily reports from Smithback concerning Hansen. However, his knowledge of a quality problem appears limited to a report from Smithback on Thursday morning. He claims that Smithback reported that "[Hansen's] production went up, [but] the quality went down when we had to remove and replace most of the work that Mr. Hansen put in because of poor workmanship." In this area, Sager's testimony was vague. He avers that Smithback on Tuesday mentioned some bad cuts on a unistrut or piece of pipe. He also asserts that on Thursday morning Smithback

Indeed, well after the fact, Vice President Stephenson in his letter of October 23, merely described Hansen's work problem as "productivity." (R. Exh. 5.) Surely, these management officials were conversant with industrial lexicon and that, given its ordinary meaning, a "productivity" problem relates to the quantity of an employees work, rather than ones ability to turn out quality parts without destroying equipment. Indeed, in light of T & C's presently, professed position that Hansen had set out deliberately to sabotage the job, one would think that these alleged indiscretions would occupy the centerpiece for objections to Hansen's employment. They obviously were afterthought, if not totally contrived.

The testimony of Sager concerning the triggering circumstances is certainly more indicative of what actually occurred than the testimony of Smithback, Steiner, and Reinders. He testified that on Wednesday, September 13 "I didn't know if we were going to keep Malcolm . . . we were evaluating him for productivity and safety violations." However, as I understand Sager's testimony, it was not until September 14, that Hansen's status came to a head. That afternoon Sager received a telephone call from Smithback who reported that because of Hansen, Reinders was "extremely nervous and upset" and he wanted to leave the job immediately "for his own safety." Reinders also mentioned that he was fed up "with

called and "mentioned something about some of the mistakes or some of his work specifics and I don't recall because it wasn't germane at the time, I think the decision had pretty much been made at that juncture." On the contrary, it clearly emerges from Sager's testimony that reports spawned by the subsequent lunchtime incident actually produced the final judgment on Hansen.

all the talk" and that there was a real problem with morale on the job. It is apparent that Smithback's report sprung from Reinders' reaction to the pro-union overtures made by Hansen during the noon break. In consequence, Sager apparently sought out Defferding, advising as follows:

[W]e've got to make a decision here, the guy is affecting the morale of our people. I know that a couple of our people were upset and one extremely agitated, he was getting a short fuse and one of the guys felt intimidated and wanted to leave the job site. I said, "listen, I don't care if we aren't working at that jobsite, I've got to look out for our personnel, we can't do that to them."

Sager did not testify that, in that conversation, any other grounds for termination were mentioned to Defferding.⁷⁶

In consequence, Sager testified that he called Smithback, stating "Hey, a decision has been made that we are going to let Malcolm Hansen go from Ameristaff. . . . I'm going to call Steve Buelow and tell him the situation and have Malcolm call Steve Buelow . . . in the afternoon." Smithback was given the "OK" to wait till after work before informing Hansen.

In explaining the discharge to Buelow, according to Sager's testimony the harassment issue went unmentioned. He claims to have told Buelow that, "the

⁷⁶ On cross-examination, Sager admitted that the morale problem was a factor contributing to the decision but denied that "it was a big part of it." Considering the chronology described on the face of his own testimony, I am convinced that the noontime incident was the proverbial "straw" that broke the "camel's back."

guy's really causing problems, he's wandering around . . . we have low productivity from him . . . he just got his safety shoes today. . . . [H]e's just not an employee or potential employee that we would look to be hiring." According to Sager, Buelow stated that rather than create issues about productivity, he would simply tell Hansen that "temporaries" had been barred from the job.⁷⁷

Sager, on cross-examination acknowledged that the safety shoes and hard hat issues were not the reason for terminating Ameristaff on this job, and did not contribute to T & C's decision not to place Hansen on its payroll. The morale problem that Hansen was causing on the job was admitted to be a "part of it." According, to Sager the other factor was Hansen's productivity, details of which he could recall. Sager

⁷⁷ Buelow testified that it was on Wednesday morning, September 13, Sager instructed: "we could not have Mickey on the job." In his words:

I was informed [by Sager] that John Quinn . . . had informed them [T & C] that Malcolm could not be there on our payroll.

With this information, Buelow claims that he instructed his assistant "to cut an invoice" permanently placing Hansen on T & C's payroll. This was countermanded later that afternoon, when Sager informed that T & C at no time indicated that they would pick up Hansen, and that they would not do so in that they had received bad reports concerning his productivity, that a man with less experience could bend pipe quicker, and that Hansen also had violated safety policies. It is noted that John Quinn testified that his conference with Stephenson took place on Monday, September 11. While T & C's good faith, in complying with obligations to the State of Minnesota is of no relevance here, the timing described by Buelow is more consistent with Quinn's uncontested testimony.

at no time made reference to the alleged failure of Hansen to perform in a workmanlike manner.

Defferding knew the difference between poor quality and poor productivity. Yet, in describing his reasons for the termination, he did not zero in on the bad parts and attempted to deflect the disharmony issue. His position concerning Hansen was based entirely on daily telephonic reports from Smithback.⁷⁸ The first, actually, was late Tuesday afternoon, September 12. Smithback called, complaining that he was disappointed with Hansen's output, his apparent disinterest in performing "physical labor" and his appearance without safety shoes.

On Wednesday, September 13, Smithback called again, complaining that Hansen was not helping with production and was missing from the job even more than the previous day, going so far as to without explanation, leave the worksite for 45 minutes to an hour. Smithback again allegedly mentioned that Hansen had been told to get his steeltoed shoes, but had not done so.

The puzzling aspect of Defferding's account arises in conjunction with a report from Smithback accusing Hansen of disrupting the crew. In this connection, the phrase "disharmony to the crew," is given a different meaning by Defferding than Sager. Thus, it will be recalled that Sager attributed such a condition to Reinders' complaints about Hansen's persistent and aggressive attempts to foist the Union on coworkers. In contrast, Defferding initially described Hansen's wandering as the cause of this disharmony. On cross-

⁷⁸ Although Defferding received Smithback's "foreman diaries," they were not available to him until September 15, after the termination.

examination, when Defferding was again given the opportunity to describe how Hansen created disharmony, he used the term to describe Hansen's constant preference for talk over work. Defferding, of course, denied knowledge as to the content or subject matter covered by Hansen on those occasions. Ultimately, Defferding admitted that later on Thursday, Smithback called back, recommending that Hansen be removed because "it was no longer possible to run a harmonious crew and still have Mr. Hansen on that crew."

Smithback's reference to disharmony was far narrower than Defferding's definition. He does not suggest that it related to any conduct other than union activity. Indeed, according to Smithback, Defferding knew that the term was used to explain Hansen's union activity during nonworking time. Thus, Smithback testified that Hansen, on Thursday, was beginning to disrupt the crew "pretty heavily" while creating "disarmony." In this connection, he specifically reported the lunchtime incident, described above, to Defferding, in terms evident in the following colloquy with the undersigned:

JUDGE HARMATZ: Excuse me a minute, did you discuss this incident with Mr. Defferding, this lunch time on Thursday incident?

THE WITNESS: Yes.

JUDGE HARMATZ: Did you tell him the scenario that you described to us, did you tell him that people were upset?

THE WITNESS: Yeah, told him people were upset.

JUDGE HARMATZ: Did you tell him why?

THE WITNESS: Yeah, I told him Randy was ready to fight or run.

JUDGE HARMATZ: And let me just go over that one more time for emphasis. The reason that these people were upset is because Mr. Hansen was constantly pushing the union on them?

THE WITNESS: Correct.

JUDGE HARMATZ: And you reported that to Mr. Defferding?

THE WITNESS: Denny, yes.

JUDGE HARMATZ: And you couldn't be mistaken about that?

THE WITNESS: No.

It was my distinct impression that the term "disharmony" more appropriately fit union activity, the subject of Reinders complaints, than the variant subjects that Defferding would place under that umbrella. In this light, the attempt to redefine, diminish, or cast aside the alleged disharmony is understandable. Sager had previously testified that "disharmony" was a factor in T & C's decision. Hansen's termination could not be upheld if provoked out of T & C's desire to appease coworkers who might have been offended by the former's attempts to organize them. Although Smithback claimed that Hansen was "hounding and badgering" the men, the testimony he offers simply shows that Hansen repeatedly solicited their support and they repeatedly declined. He was alone, the others unified. In this context, if management sought to restore harmony, statutory guarantees would require counselling those disturbed by, before condoning adverse action against, the union protagonist.⁷⁰

⁷⁰ In a weak attempt to associate the fears of the men with violence apparently addressed to B.E. & K. at the site, Smith-

In sum, the defense is laden with several shifts. First the effort to demean Hansen on the quality of his work is unconfirmed by the objective evidence, and though these allegations against Hansen reflect a consistent pattern of incompetence, they were given faint attention by Sager, Defferding, or Stephenson in describing the grounds for rejecting Hansen. This discrepancy is paralleled by the events of Thursday, September 14. I am convinced that on that day, T & C personnel at the jobsite and at headquarters were preoccupied with the question of disharmony created by Hansen's persistent efforts to push the Union. Sager's testimony suggests that this was a triggering event, while Defferding would engage in a conscientious attempt, alternatively, to disguise and then, steer away from this factor.

In my opinion, it was the noontime incident that caused the breakdown in T & C's will to endure Hansen. Thus, Sager testified that, because of job indiscretions, he would have acted in terminating Hansen a day or a day and a half sooner were it not for the need for Hansen's license. Smithback, though confessing to a limited opportunity to observe Hansen on Tuesday, September 12, claims that he would have

back acknowledged that Hansen had told the men that his Union had nothing to do with the violence, but he could not speak for the unions engaged in the B.E. & K. dispute. At p. 89 of its postbearing brief, counsel for T & C appears to have been led by imagination in arguing that "Hansen did everything he could to make Reinders believe that the past [union violence] was repeating itself . . ." and further that "Hansen had done everything he could to play on the fears of the T & C crew and to increase the pressure on them." If anything, these assertions are refuted, rather than supported by, this record.

terminated him at the end of that day for similar reasons. As matter's turned out, Hansen was eliminated on Thursday, September 14, when nothing had changed—T & C still had no assurance of replacement, and the licensing problem persisted.⁸⁰ Indeed, the urgency to remove Hansen is even more suspect when one considers Defferding's testimony that, as of September 14, T & C had other licensed electricians lined up to report on this job. Apparently, T & C could not wait for the arrival of these replacements. Moreover, even with the hiring of replacement Ensign, Sager testified that the need for qualified journeyman did not end, for he relates that in the days that followed Hansen's termination, T & C did not "know if we were going to be able to man the job with licensed electricians." During the following week, as he relates: "The President of our Company was making the decision . . . whether or not we were going to continue at Boise Cascade or back out entirely."

⁸⁰ A replacement was obtained, but not until after the decision to eliminate Hansen. Sager testified that, he was not involved in the recruitment, but that a licensed electrician, Fred Ensign, was hired after the Hansen termination on Friday, September 15, thus, allowing the job to progress. Defferding was instrumental in the hiring of Ensign. On Thursday, September 14, Defferding claims to have telephoned Guy Martin of B.E. & K., stating, "we were to be releasing through Ameristaff . . . our licensed . . . person and that we would be requiring an electrician for a short term basis because we had some other people coming on, that we need somebody . . . with a license." B.E. & K. obliged and effective Friday, September 15, Ensign was transferred from B.E. & K.'s payroll to that of T & C. Ensign was hired sight unseen, solely upon B.E. & K.'s recommendation in this regard, and apparently without independent basis for evaluation.

In my opinion, the defense in Hansen's case was structured on a thinly veiled attempt to mislead as to the true reasons for T & C's action, and, since lacking in credible support, fails to rebut the inference of unlawful motivation. Moreover, Sager's own testimony, and the efforts by Defferding to shy away from the noontime encounter, strongly suggests that the outrage of coworkers concerning Hansen's protected activity during that incident was the pivotal event leading to his termination. This view of the evidence actually bolsters the General Counsel's position, and, in any event, it is plain that T & C has failed to substantiate by credible evidence that Hansen would have been removed even if he had not engaged in organizational activity. It is concluded that the Respondent T & C violated Section 8(a)(3) and (1) of the Act in this respect.

4. The individual refusals to hire

a. *Preliminary statement*

The third area of discrimination pertains to alleged illegal refusals to hire in connection with telephonic expressions of employment interest by Local 343 members Charles Evans on September 13, and Roger Kolling, on September 20.⁸¹ Neither appeared at the Embassy Suites.

The separate routes taken by Kolling and Evans did not lead to employment.

Independent 8(a)(1) violations are also attributed to Respondent in this regard. They include alleged interrogation of Kolling by Sager and Defferding, and

⁸¹ Local 343, like Local 292, has no jurisdiction over International Falls. Its geographic sphere consists 39 counties in southern and western Minnesota.

a threat by Sager to Evans that he would have to resign from the Union if hired.

b. *Richard Kolling*

Kolling, since 1986 and during the events in issue here, served as a full-time Local 343 business representative. He denies that union sources led him to apply for work with T & C. Instead, he claims that on September 18, he received a job lead from the Minnesota State Employment Service. (G.C. Exh. 16.) He denies any prior awareness of T & C.

On September 20, he acted on the referral by calling T & C. He spoke to Sager. Kolling relates that Sager inquired as to his union status, but that Kolling denied any affiliation with unions, indicating that he was not a union member, instead stating that he had operated as an "open shop" contractor in Rochester, Minnesota. After discussing the scope of Kolling's operation as a contractor, Sager put Defferding on the phone. Defferding also inquired as to Kolling's union status, with the latter again entering a denial, while ultimately stating: "why all the . . . union questions . . . because I was really . . . trying to get a job." Kolling was asked by Defferding if he would accept work in International Falls, while indicating that the rate was \$15 hourly, with travel allowances. Defferding stated that he would mail out an application after Kolling furnished a resume. Kolling advised that he would do so.

Sager acknowledged that he participated in such a conversation with Kolling. The latter identified himself as an electrical contractor. Concerning Kolling, Sager testified, "I remember asking him what kind of contractor he was . . . was he a residential, commercial or industrial, licenses that he held, was he a

union contractor or a non-union contractor, does he work with either . . . because we subcontract work out . . . to subcontractors for different projects." Kolling said he was just looking for temporary work because things were slow at the time. They then discussed the Boise-Cascade job, whereupon Sager put Defferding on the phone.

Defferding testified that they first discussed Kolling's industrial experience. Later, when union affiliation arose, Defferding assertedly stated that T & C had "no problems with that." Kolling was informed of T & C's interest, and was asked if he had a resume. He said he did, whereupon Defferding requested that he forward it immediately.⁸²

Kolling never did so. According to the General Counsel, Kolling's failure to submit a resume did not defeat the allegation that T & C unlawfully declined to hire him. According to Kolling, he soon realized that any resume would include references betraying his denials of union affiliation. For this reason, on September 21, he called Sager to disclose his union ties. Sager indicated that this was not a concern. Kolling then indicated that he wished to continue the process by completing an application. According to Kolling, though Sager agreed to forward the application, it was never received. Sager admits to this conversation, but claims that he suspected that Kolling was trying to get something that he shouldn't so Sager was "on his guard." During the conversation, Kolling informed Sager that the September 20 conversation had been taped and that he was concerned about

⁸² Kolling failed to relate that he ever submitted the resume. According to his own testimony, Defferding told him to do so before an application would be forwarded.

Sager's questions concerning the Union.⁸³ He claims that, because of the taping, an application was sent out to Kolling. However, to the Company's knowledge, it was never completed and returned.⁸⁴

In my opinion, the General Counsel has failed in this instance to produce credible, prima facie evidence warranting a finding that Kolling's failure to land a job was based on anything other than his own inaction. The probabilities support the testimony of Sager,⁸⁵ and I am convinced that an application was duly forwarded, but never returned. The submission of a completed application was understood by all to be a critical requisite for hire, and this omission by Kolling, offered the sole, nondiscriminatory reason for his inability to secure employment. The 8(a)(3) and (1) allegations in his case shall be dismissed.

⁸³ Kolling had two conversations with T & C representatives. He attempted to tape both. He claims that the tape of the first did not take. In any event, no tape or transcript of a tape was offered in evidence.

⁸⁴ Kolling's name appears on R. Exh. 11, a computer list of all sent applications. The document indicates that his application was mailed on September 22.

⁸⁵ Kolling was not a persuasive witness and his uncorroborated testimony was an unsuitable basis for findings prejudicial to T & C. It is true that Sager admittedly asked Kolling if he had operated as a union contractor. However, such an inquiry, when addressed to an individual who identifies himself as an employing enterprise, rather than an employee, does not strike as inherently coercive. No rationale which reasonably would support a finding of illegality in this context has been offered. The 8(a)(1) allegations implicating Defferding and Sager in proscribed interrogation are dismissed.

c. Charles Evans

In September 1989, Evans was an unemployed licensed electrician and a member of Local 343. He was contacted by his business representative and told to call the 414 telephone number which corresponded to that appearing in the September 11 edition of the Minneapolis Star Tribune (G.C. Exh. 4.) On September 13, he did so, speaking to Lorrie of Ameristaff. The latter questioned him as to qualifications and work history, and then asked if he were union or nonunion. He declared himself as union, inquiring as to why she would ask. Lorrie allegedly said, "We have to know whether you are union or nonunion because we don't put union people on nonunion jobs."⁸⁶ According to Evans, she then said she would have Buelow contact him later in the week.

⁸⁶ The complaint, over denial, alleges that "Lori" is an agent of Ameristaff. It further alleges that the Respondents violated Sec. 8(a)(1) by her interrogation of Evans during this phone conversation. Once more, I am left to my own devices, for the General Counsel has failed to brief either issue. On the merits, the task is rudimentary, for Evans' account was uncontradicted and there is every reason to believe that this occurred. On the question of agency, Buelow acknowledged that he was assisted by someone named Lori, and that she was relegated to the task of answering the phone, and performing the initial screening. This latter function, included inquiries concerning union status. In this light, the testimony of Evans completes the circumstantial chain indicating that he and Buelow were describing the same individual, and that she was an agent whose conduct was binding on Respondent Ameristaff. In context of her other remarks, this interrogation of a job prospect was clearly coercive and violative of Sec. 8(a)(1). Moreover, the unfair labor practice, having been committed within the spectrum of operations for which Ameristaff had been retained by T & C, is deemed binding on the latter.

However, on September 13, Evans telephoned Lorrie again, questioning her once more as to the interest in his union affiliation. She reiterated her explanation, but inquired as to whether Evans would work non-union. Evans signified that he would.

Evans testified that he never received the promised phone call from Buelow. However, Buelow relates that when Evans called Lorrie the second time, the call was transferred to him. Evans allegedly complained that in his earlier conversation, Lorrie had asked him illegal questions about his union affiliation, observing further that this was totally unnecessary. Buelow claims that he explained that Ameristaff works with union and nonunion contractors, including the contractor at Boise Cascade. Evans stated that he wanted work on that project. Buelow testified that he would have a T & C official call him, because Ameristaff could not hire him for that job.

Evans admits that he was subsequently contacted by Sager. The latter allegedly informed him that it was T & C's position that "they didn't hire any . . . union people at the job site, that if I wanted to work there, that if I wanted to work there that I would have to drop my union affiliation." Evans gave no definite answer, whereupon Sager told him to give him a call if he changed his mind about accepting the job. There was no further communication between Evans, Ameristaff, and/or T & C.

Sager recalled a phone conversation with Evans. He related that when he informed Evans that the job was at Boise Cascade in International Falls, Evans expressed concern at the violence he had read about in the newspapers at that site. When Sager pointed out that those reports concerned a new construction job and not the maintenance work that T & C was

engaged in, Evans stated, "Well I don't know if I'd be willing to go up there and work under those circumstances." Evans was again asked if he would be willing to take the job, but Evans again replied, "I don't know if I would or not." According to Sager, he told Evans to give him a call if he "changed his mind." Sager denied telling Evans that union people would not be hired at that jobsite, or that Evans would have to drop his union affiliation if he wanted to work there.

On cross-examination, Evans acknowledged that he was concerned about reported violence at the Boise-Cascade site, and that Sager attempted to assuage him of this concern, while advising him at length of the precautions that had been taken to neutralize the "trouble." Evans insists, however, that it was not the violence but the trouble he would face from Local 343 if he renounced union membership that discouraged him from accepting the job.

In this light, I credit Sager and Buelow, and conclude that Evans expressed disinterest in employment at Boise Cascade, that no statements were made concerning any nonunion policy or union resignations by Sager, and that T & C at no time refused him employment by reason of union affiliation. In short, in this instance the General Counsel has failed to adduce credible proof that proscribed considerations played any part whatever in Evans' failure to obtain a job at Boise Cascade. The 8(a)(3) and (1) allegation in this respect shall be dismissed.

CONCLUSIONS OF LAW

1. The Respondents, Ameristaff and T & C, are employers engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Respondent Ameristaff is the agent of Respondent T & C for the purposes of soliciting job applicants, arranging for the hire and completion of applications for those prospects, and the maintenance of payroll and employment records of those hired for Respondent T & C's account at the Boise-Cascade jobsite.

3. Local 292 and 343 of the International Brotherhood of Electrical Workers are labor organizations within the meaning of Section 2(5) of the Act.

4. Respondent T & C on September 7, 1989, violated Section 8(a)(3) and (1) of the Act by refusing to interview and consider for employment the job applicants listed below because of their union membership:

Ken Axt	Red Larson
Steve Claypatch	Greg Shafranski
Steve Leyendecker	David Hagen
Robert Hallman	Bob Printy
Harley Barton	Michael Priem

5. The Respondents, T & C and Ameristaff, on September 13, 1990, violated Section 8(a)(1) of the Act by interrogating a job applicant concerning union activity.

6. Respondent T & C, on September 13, 1990, violated Section 8(a)(1) of the Act by banning employee union activity during nonworking time, and by threatening discharge for engaging in such activity.

7. Respondent T & C, on September 13, 1990, violated Section 8(a)(1) of the Act by inquiring as to what it would take to induce an employee to refrain from union activity.

8. Respondent T & C, on September 14, 1989, violated Section 8(a)(3) and (1) of the Act by refusing to retain Malcolm Hansen because of his union activity.

9. Respondent T & C did not, since September 13, 1990, refuse to employ Charles Evans, or from September 20, 1990, refuse to hire Roger Kolling for reasons proscribed by Section 8(a)(3) and (1) of the Act.

10. Except as found in paragraphs 4, 5, 6, 7, and 8 above, the Respondents did not engage in any of the unfair labor practices set forth in the complaint.

THE REMEDY

Having found that Respondent T & C has engaged in certain unfair labor practices, it shall be recommended that it cease and desist therefrom, and take certain affirmative action deemed necessary to effectuate the policies of the Act.

It having been found that Respondent T & C, in effect, terminated Malcolm Hansen in violation of Section 8(a)(3) and (1) of the Act, it shall be recommended that it be ordered to reinstate him to his prior position and make him whole for earnings lost by reason of the discrimination against him.

Having found that the Respondent violated Section 8(a)(3) and (1) of the Act by refusing to hire the employees named below:

Ken Axt	Red Larson
Steve Claypatch	Greg Shafranski
Steve Leyendecker	David Hagen
Robert Hallman	Bob Printy
Harley Barton	Michael Priem

it shall be recommended that they be offered immediate employment in positions for which they have applied and are qualified, to the extent vacancies exist, and they shall be made whole for any earnings lost by reason of the discrimination against them.

Backpay due under the terms of this Order shall be computed on a quarterly basis as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), and shall be reduced by net interim earnings, with interest computed as specified in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). All reinstatement and backpay recommendations are subject to the procedures discussed in *Dean General Contractors*, 285 NLRB 573 (1987), and *Haberman Construction Co.*, 236 NLRB 79 (1978).

With respect to Respondent Ameristaff, with one exception, all unfair labor practices found, occurred outside the scope of its authority. The unlawful discrimination and coercive conduct imputed to T & C was effected by that firm at times and under conditions where its authority was exclusive. Ameristaff was in no position to influence the unlawful failure at Boise Cascade to retain Hansen or the termination of interviews at the Embassy Suites. In this light, the remedial burden imposed on T & C should not be lightened by any form of shared relief between these parties, and to do so, in the circumstances, would penalize Ameristaff for having a business relationship with the perpetrator of unlawful conduct.

Respondent Ameristaff committed a single act of unlawful interrogation. In that connection, the findings should be sufficiently instructive to make entry of a formal order against Ameristaff a needless exercise. The incident is remedied adequately through

the Order recommended in the case of T & C. For this reason, and considering the nature of this singular violation, together with Ameristaff's method of operations, no remedy shall be recommended in its case.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended ⁸⁷

ORDER

The Respondent, Town & Country Electric, Inc., Appleton, Wisconsin, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Coercively interrogating job applicants concerning their union membership.

(b) Instructing employees to cease engaging in union activity during nonworking time, and threatening them with discharge if they do not comply.

(c) Asking employees whether they could be bribed to refrain from engaging in union activity.

(d) Discouraging union activity by refusing to hire, terminating, or in any other manner discriminating against employees with respect to their hours, wages, or other terms and conditions or tenure of employment.

(e) In any like or related manner interfering with, coercing, or restraining employees in the exercise of the rights guaranteed by Section 7 of the Act.

⁸⁷ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer immediate employment to the employees listed below in positions for which they applied and qualify or, if nonexistent, to substantially equivalent positions, and make them whole for losses sustained by reason of the discrimination against them, with interest, as set forth in the remedy section of this decision:

Ken Axt	Red Larson
Steve Claypatch	Greg Shafranski
Steve Leyendecker	David Hagen
Robert Hallman	Bob Printy
Harley Barton	Michael Priem

(b) Offer Malcolm Hansen immediate reinstatement to his former position or, if nonexistent, to a substantially equivalent position, and make him whole for losses sustained by reason of the discrimination against him, with interest, as set forth in the remedy section of this decision.

(c) Remove from its files, delete, and expunge any and all reference to the unlawful termination of Malcolm Hansen, notifying him that said action has been taken, and that said termination will not be used against him in the future.

(d) Preserve and, on request, make available to the Board and its agents for examination and copying, all payroll records, social security records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(e) Post at its facilities in Appleton, Wisconsin, and International Falls, Minnesota, copies of the at-

tached notice marked "Appendix." ⁸⁸ Copies of the notice, on forms provided by the Regional Director for Region 18, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(f) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

⁸⁸ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
 POSTED BY ORDER OF THE
 NATIONAL LABOR RELATIONS BOARD
 An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

- To organize
- To form, join, or assist any union
- To bargain collectively through representatives of their own choice
- To act together for other mutual aid or protection
- To choose not to engage in any of these protected concerted activities.

WE WILL NOT coercively interrogate job applicants concerning their union membership or preference for union or nonunion work.

WE WILL NOT instruct employees to cease engaging in union activity during nonworking time or threaten them with discharge if they do not comply.

WE WILL NOT ask employees whether they could be bribed to refrain from engaging in union activity.

WE WILL NOT discourage union activity by refusing to hire, terminating, or in any other manner discriminating against employees with respect to their hours, wages or other terms and conditions or tenure of employment.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the

exercise of rights guaranteed them by Section 7 of the Act.

WE WILL offer immediate employment to the employees listed below in positions for which they applied or, if nonexistent, to substantially equivalent positions, and WE WILL make them whole for losses sustained by reason of the discrimination against them, with interest:

Ken Axt	Red Larson
Steve Claypatch	Greg Shafranski
Steve Leyendecker	David Hagen
Robert Hallman	Bob Printy
Harley Barton	Michael Priem

WE WILL offer Malcolm Hansen immediate reinstatement to his former position or, if nonexistent, to a substantially equivalent position, and make him whole for losses sustained by reason of the discrimination against him, with interest.

WE WILL remove from our files, delete, and expunge any and all reference to the unlawful termination of Malcolm Hansen, notifying him that said action has been taken, and that said termination will not be used against him in the future.

TOWN & COUNTRY ELECTRIC, INC.

NO. 94-947

(2)

Supreme Court, U.S.

FILED

DEC 23 1994

OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1994

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

**TOWN & COUNTRY ELECTRIC, INC. AND
AMERISTAFF PERSONNEL CONTRACTORS, LTD.,**
Respondents.

**On Petition to the United States Court of Appeals
for the Eighth Circuit**

**BRIEF FOR RESPONDENT IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI**

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30 PA

QUESTION PRESENTED

Whether a paid union organizer who is committed by a union's "salting" resolution to work for the union in furtherance of its organizing drive against a nonunion employer and who works for, or seeks to work for, the targeted nonunion employer, is a bona fide "employee" of the targeted nonunion employer, within the meaning of Section 2(3) of the National Labor Relations Act (29 U.S.C. § 152(3)).

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STATEMENT

This case involves paid union organizers operating under a "salting" resolution of a Local Union (hereinafter "the Union") affiliated with the International Brotherhood of Electrical Workers (hereinafter "the IBEW"). The Union's salting resolution applies to all the alleged discriminatees in this case. The purpose of the salting resolution is to create a very narrow and carefully defined exception to the general provisions of the Union's constitution and by-laws which prohibit members of the Union from working for nonunion employers.

The salting resolution states that the salted organizers shall be under the supervision of the Union's Business Manager and/or Assistant, and, ". . . shall promptly and diligently carry out their organizing assignments, and leave the employer or job immediately upon notification . . ." (App. 10a)¹

The salted organizers are paid for their services to the Union. The Union pays fringe benefit contributions to the Union's fringe benefit funds on behalf of the salted

¹ Cites will be as follows: App. __ references the appendix attached to the Petition for a Writ of Certiorari. 8th Cir. Jt. Ap. __ references the joint appendix filed with the Eighth Circuit Court of Appeals.

organizers for the hours they work for the targeted nonunion employer. (App. 14a, 16a) And, at a minimum, they are paid wages by the Union in an amount equal to the difference between the union scale and the wage rate paid by the targeted nonunion employer. (App. 9a) However, Malcolm Hansen received almost \$1,100 from the Union for his organizational efforts as compared to \$725 for his work for Town & Country Electric, Inc.² (hereinafter "TCE"), the targeted nonunion employer. (App. 9a) Presumably, the other salted organizers would have received similar pay from the Union if they had been hired by TCE. In any event, it is apparent from the amount of compensation Hansen received from the Union, that his primary purpose in entering TCE's workforce was not to receive the pay provided by the contractor.

The National Labor Relations Board (hereinafter "NLRB") held that the obligations imposed by the Union's salting resolution on the salted organizers, and the compensation they were to receive from the Union for the services they performed for the Union during the time they

² Pursuant to Rule 29.1, TCE advises the Court that there are no parent or subsidiary companies.

were ostensibly working for TCE, did not prevent the salted paid organizers from entering into a bona fide employment relationship with TCE, the targeted nonunion employer. The Eighth Circuit Court of Appeals disagreed.

In this case, TCE obtained maintenance work at the existing Boise Cascade mill in International Falls, Minnesota in September of 1989. (App. 2a) TCE learned that it needed one Minnesota licensed electrician for every two electricians working on that job who weren't licensed in Minnesota. At that time, none of TCE's electricians were licensed in Minnesota. (App. 2a)

To help it recruit Minnesota-licensed electricians, TCE retained Ameristaff, a temporary employment agency, who advertised for licensed electricians in a Minneapolis newspaper. (App. 2a-3a) Interviews were scheduled with Minnesota licensed electricians who had called Ameristaff in response to the ad, at the Embassy Suites Hotel in Minneapolis, Minnesota. (App. 2a-3a)

The interviewers' chartered flight from Appleton, Wisconsin, the location of TCE's home office, was delayed for approximately two hours due to bad weather. (App. 3a, 52a) Because the interviewers did not want to miss TCE's scheduled, weekly manpower meeting that afternoon at its

home office, they were anxious to complete the interviews and return to Appleton. (App. 3a)

The interviewers offered a job to the second person they interviewed. (App. 3a) After the second interview, Steve Buelow, from Ameristaff, reported that the remaining people who had filled out applications in the adjoining room, were not scheduled for interviews. Buelow also observed that the intruders appeared to be from a union. (App. 3a) Ron Sager, TCE's manager of human resources, decided, because of his desire to get back to the manpower meeting in Appleton, to only interview those applicants with appointments. (App. 3a)

Upon being told of Sager's decision, the intruders became quite unruly, and one of them, Malcolm Hansen, claimed to have an appointment. (App. 3a) Sager tried to quiet the crowd and promised to interview Hansen if he had indeed scheduled an interview. (App. 3a, 19a) Hansen was interviewed after it was confirmed he had scheduled one, and he was hired even though he volunteered information that he was affiliated with the Union.³ (App. 4a)

³ In its Petition, the NLRB presented several findings of fact apparently intended to show that TCE was discriminatorily motivated. (continued...)

The ALJ, with the NLRB's approval, found that TCE had discriminatorily refused to consider the applications of the intruders at the Embassy Suites interviews, based primarily on the ALJ's presumption of TCE's discriminatory motivation. However, the ALJ found that TCE did not act unlawfully when it failed to consider the intruders' applications after Ameristaff was removed from the job a few days later when it was discovered that Minnesota law would not permit TCE to count Ameristaff employees towards the licensed electrician ratio requirements, because if TCE had hired any of those applicants, whose qualities were unknown,

³(...continued)

The NLRB also asserted, in footnote 7, page 9 of its Petition, that TCE had not challenged these findings of unlawful conduct. Contrary to the NLRB's assertion, the Employer has vigorously opposed all the findings of discriminatory motive and the related findings of violations of 29 U.S.C. § 158(a)(1), on the ground that those findings are the product of the Administrative Law Judge's (hereinafter "ALJ") improper presumption that all nonunion employers will discriminate against people affiliated with a union which might attempt to unionize them. The ALJ made that presumption irrebuttable by using it to resolve credibility issues against TCE even though the ALJ had substantially discredited Hansen's testimony regarding the Embassy Suites interviews. See, e.g., App. 108a-109a, fn. 72; App. 77a, fn. 34; App. 65a. It is and has been TCE's position that, absent the ALJ's presumption of discriminatory motive, the record establishes that no discriminatory or coercive statements were made by any agent of TCE and that no agent of TCE engaged in any unlawful conduct. The Eighth Circuit found it unnecessary to decide that issue. App. 11a.

it would have had to pay Ameristaff a substantial fee. (App. 56a-57a) And, the ALJ found that TCE had not unlawfully interrogated or made unlawful statements to Malcolm Hansen or others at the Embassy Suites interview session, notwithstanding Hansen's claims that such statements were made. (App. 72a-73a, 75a-78a) The ALJ also found that TCE had not unlawfully interrogated or discriminated against Charles Evans or Roger Kolling. (App. 124a, 127a)

At the Boise Cascade mill in International Falls, Hansen spent much of his working time talking to TCE employees about the advantages of unionization, despite being warned to refrain from disrupting the work of other employees during working time. (App. 4a, 110a, fn. 73) As a result, a number of TCE's employees complained to their supervisor that Hansen was interfering with their work. (App. 49)

TCE contended that, when Hansen did work, he abused TCE's tools and equipment and performed poor quality work. The ALJ, with NLRB approval, largely discredited the testimony of four TCE employees regarding Hansen's poor work performance essentially based on Hansen's denial, even though the ALJ had discredited

Hansen elsewhere and had caught him lying in his explanation of his work performance.⁴ (App. 110a-121a)

After Hansen had been on the job for three days, Ameristaff learned that TCE could not use Ameristaff employees to satisfy the Minnesota licensed electrician ratio requirements, and, therefore, let Hansen go. (App. 107a-108a)

The ALJ, with NLRB approval, found that TCE's failure to put Hansen on its payroll was discriminatorily motivated. (App. 121a, 14a) The ALJ and the NLRB further found that representatives of TCE had made several unlawful statements at the International Falls project, again,

⁴ The ALJ frequently found the General Counsel's principal witnesses, Hansen and Priem, unreliable. (App. 54a, fn. 15, 72a-74a, 86a, fn. 44, 109a, fn. 73) Indeed, the ALJ caught Hansen lying when Hansen supported his denial that he had ruined TCE's drill bits by claiming that he always carried a unibit with him. Hansen claimed that he had the unibit drill bit in his pocket all day during the hearing, but the ALJ's inspection revealed the metal bit was still cold, apparently from having recently been brought into the hearing room after recently being outside in the December cold characteristic of Minneapolis. 8th Cir. Jt. Ap. 339-340. Essentially the only basis for the ALJ's partial crediting of Hansen was the ALJ's presumption of TCE's unlawful motivation. The ALJ implicitly acknowledged that fact when he justified his findings by stating that the testimony of TCE's witnesses didn't "comport with economic reality" and that the General Counsel's witnesses' testimony was "more plausible." (App. 65a, 108a-109a, fn. 72)

based primarily on the ALJ's presumption of TCE's discriminatory motivation. (App. 13a-14a, 109a-110a)

The Eighth Circuit Court of Appeals decided that none of the alleged discriminatees were bona fide employees of TCE within the meaning of the National Labor Relations Act (hereinafter "NLRA"), as amended. (App. 9a) Therefore, no violation of the NLRA occurred. The Eighth Circuit found it unnecessary to decide whether the NLRB improperly approved the ALJ's use of an irrebuttable presumption that all nonunion employers are unlawfully motivated to discriminate against individuals who are affiliated with a union, or whether the Board failed to follow the precedent that permits employers to prohibit solicitation during work time. (App. 10a-11a) Accordingly, the Eighth Circuit denied enforcement of the NLRB's order. (App. 11a)

REASONS FOR DENYING THE PETITION

The Petition herein should be denied because the Eighth Circuit's decision is based on the specific facts of this case relating to the Union's salting resolution, and there is no other court of appeals decision based on a local union's salting resolution. Therefore, there is no conflict in the circuits regarding whether individuals governed by the salting resolution herein are bona fide employees of the targeted nonunion employer. In addition, the Eighth Circuit's decision is correct.

This Case Is Unique

The Eighth Circuit said that the Union's salting resolution was "controlling" on the issue of whether the alleged discriminatees were bona fide employees within the meaning of the NLRA, as amended. The NLRB acknowledges, in footnote 13, page 27 of its Petition for a Writ of Certiorari, that no other court of appeals has considered the effect of a salting resolution on that issue.

The NLRB seeks to avoid this lack of a conflict in the circuits by speculating that the Eighth Circuit would have reached the same result absent the salting resolution, based on that Court's endorsement of the Fourth Circuit Court of

Appeals' reasoning in H.B. Zachry Co. v. N.L.R.B., 886 F.2d 70 (4th Cir. 1989).

Since the Eighth Circuit disposed of the issue herein on the basis of the salting resolution, its comments regarding the Zachry case were essentially dicta. This is confirmed by the Eighth Circuit's statement that all twelve of the alleged discriminatees, including the two full-time paid union officials, were members of the Union. (App. 3a) Indeed, the Eighth Circuit specifically included the two full-time paid union officials in its holding that the salting resolution by which all the alleged discriminatees were bound was inconsistent with an employment relationship with the targeted nonunion employer. (App. 9a) Therefore, it was unnecessary for the Eighth Circuit, and it is unnecessary for this Court, to consider the more general holding in the Zachry case, *supra*.

The NLRB also claims, without any support in the record, that union constitutions or by-laws, in general, often contain provisions which permit members to work for nonunion employers with permission of the union.⁵

⁵ It is common for the constitutions and by-laws of construction trades unions to prohibit members from working for employers who do not have a labor agreement with that trade union.

Such general permission provisions, even to the extent they may exist, are substantially different from the provisions of the salting resolution herein. The general permission provisions may apply to a wide variety of situations, e.g., when work is not available through the union, when the member is learning another trade, or is temporarily working in another trade, etc. The general permission provisions do not contain an affirmative obligation to work for the union, under the control of the business manager, in furtherance of the union's organizing drive while on the targeted nonunion employer's payroll, nor do they contain any commitment on the part of the union to compensate the member for the services provided to the union by the member. Further, the general permission provisions do not contain an express requirement that the member perform organizing duties promptly and diligently, nor do they contain the express right of the business manager to force the member to leave the nonunion employer as soon as the member's organizing service to the union is complete. The difference between the salting resolution and the general permission provision is confirmed by the fact that the Union herein considered it necessary to adopt the salting resolution before asking members to work as salted union organizers.

Therefore, the Eighth Circuit's decision herein does not apply to members of a union who are not covered by a salting resolution and are not similarly controlled by the Union.

The NLRB represents, at page 29 of its Petition, that there are other cases involving the more general Zachry holding being processed through the NLRB and the courts. It would appear advisable for the Court to wait for a more appropriate vehicle than the instant case for directly addressing the split in the circuits on the Zachry holding.

The NLRB relies heavily on the decision of the Court of Appeals for the D. C. Circuit in Willmar Electric, 968 F.2d 1327 (D.C. Cir. 1992) cert. denied, 113 S. Ct. 1252 (1993). However, the court in that case reserved the issue herein. It stated it was "... leaving to another day the issue of when employment ties to a union establish such a risk of disloyalty that the (nonunion) employer can reject or dismiss the union employee on that ground." The Eighth Circuit decided that the salting resolution in the instant case was an employment tie that established a sufficient risk of disloyalty that an employer may reject an employee on that ground. The Eighth Circuit's decision herein on the issue of the effect of the salting issue on the status of the salted organ-

izers is not inconsistent with the D. C. Circuit Court of Appeals' decision in the Willmar Electric case.⁶

The Eighth Circuit's Decision Is Correct

As more fully set forth in the Eighth Circuit's decision (App. 5a-9a), the NLRA, as amended, only protects employees as defined in that Act. Lechmere, Inc. v. N.L.R.B., 502 U.S. ___, 112 S. Ct. 841, 845, 117 L. Ed. 2d 79 (1992). And, as acknowledged by the NLRB on page 13 of its Petition, in interpreting the term "employee," as used in the NLRA, the NLRB and the courts are to be guided by the common law.⁷ The common law provides

⁶ A person is only entitled to the protections of the NLRA if that person is an employee. The D. C. Circuit in Willmar Electric, *supra*, failed to recognize that threshold issue. Instead, that court assumed that the paid union organizer was an employee protected by the NLRA and then examined the record to determine if he had done something outside the scope of protected activity which caused him to lose his status as an employee, thereby improperly shielding the conflict created by his paramount duty to the union that, under the Law of Agency, disqualified him from being an employee of the targeted nonunion employer.

⁷ The NLRB does not assert that Congress has said that paid union organizers planted in a targeted nonunion employer's workforce pursuant to a salting resolution are "employees" of the nonunion employer within the meaning of the NLRA, as amended. However, the NLRB does assert that Congress has said, in § 302(c)(1) of the Labor Management Relations Act of 1947 (hereinafter "LMRA") (29 U.S.C. § 186(c)(1)),
(continued...)

that a person may not be the servant of two masters if the service to one involves an abandonment of or a conflict with the service to the other. Restatement (Second) of Agency, § 226 (1957).

The Law of Agency requires that the capacity of the person to be an agent be viewed from the perspective of the principal, in this case, TCE, the employer. The issue is whether a person seeking employment can enter into a bona

⁷(...continued)

that an individual is not necessarily disqualified from working for both a union and an employer. That very general provision contemplates union stewards and officers who work for a unionized employer. They all work towards the mutual implementation of the collective bargaining agreement. That does not create the type of conflict of interest that exists under a salting resolution between a union and the targeted nonunion employer.

Indeed, even the NLRB recognizes that a conflict of interest of significant magnitude to disqualify a union agent from being an "employee," may exist in certain situations. In Sunland Construction Co., Inc., 309 N.L.R.B. 1224, 1230-1231 (1992), a companion case to the instant case, the NLRB held that, in a strike situation, the interests of the salted organizer are "inherently and unmistakably inconsistent with employment [for the nonunion employer] behind a picket line" and that a nonunion employer does not violate the NLRA by refusing to hire an agent of the striking union. This shows that the NLRB does not consider Section 302 to represent blanket approval by Congress of all situations in which an individual is employed by both a union and an employer. In fact, Section 302 of the LMRA merely recognizes that there may be situations, e.g., in a collective bargaining setting, where an individual could be a bona fide employee, as defined in the common law, of both a union and an employer. Therefore, Section 302 of the LMRA is not inconsistent with the Eighth Circuit's decision herein.

fide employment relationship in which that person is free to conform to the employer's requirements. If the person's prior relationship restricts the person's freedom to conform to the second principal's requirements, then that prior relationship, in effect, requires that person to abandon his or her service to the second principal. That person's response to the second principal's directions is dictated by that person's conflicting obligation and paramount responsibility to the first principal which, in this case, is the Union. Under those circumstances, that person cannot enter into a bona fide agency relationship with the second principal. Thus, under the Law of Agency, the second principal isn't required to take the risk that the person who is contractually bound to a master with conflicting interests will fail to diligently perform that person's duties as an agent of the second principal. Such a conflict of interest exists in this case.

The NLRA contemplates that an employer and a union have equal rights to compete for the confidence and the votes of the employer's employees. The NLRA recognizes that the employer and the union have conflicting interests and it provides rules within which those adversarial

interests may legitimately compete for the votes of the employees.

As acknowledged by Member Oviatt in his concurring opinion in Sunland Construction Co., Inc., 309 N.L.R.B. 1224 (1992), which was consolidated with the instant case for oral argument before the NLRB, "... the relationship between a nonunion employer and a union seeking to organize its employees is usually adversarial, and sometimes quite heated." Id., 1231-1232. See also, Labor Relations Law in the Private Sector, F. Bartosic and R. Hartley, pp. 60-61. "In administering [the NLRA], the Board and the courts seek to accommodate the legitimate, but competing, and at times conflicting, interests of the employer, the employees, the union, and the public at large The clash of competing and conflicting interests is perhaps most apparent in the context of union organizational campaigns"

Those conflicting interests give salted paid union organizers an irreconcilable conflict of interest. A paid union organizer who is successful in getting on the targeted nonunion contractor's payroll has ample opportunity to serve the interests of his primary master, the union, by acting adversely to the interests of the targeted nonunion employer

while masquerading as an employee of that employer. The salted organizer can cast the nonunion contractor in a bad light in the eyes of the employees of the contractor by the manner in which the salted organizer performs its work, or doesn't perform its work, as well as by what the salted organizer says and does. That is in direct conflict with all employees' obligation to an employer to apply the employee's best efforts to perform the work assigned to the employee while working for that employer. Yet, it would be virtually impossible for the nonunion contractor to prevent the salted organizer's deleterious conduct through the disciplinary procedure, because it would be very difficult for the contractor to know or to prove that the salted organizer had not acted in good faith. And, the protections of Section 7 of the NLRA, which are intended by Congress only to be granted to bona fide employees, could be interpreted to prevent the contractor from taking any action in response to a substantial amount of the salted organizer's anti-contractor activity, since the protections afforded by Section 7 are very broad in order to protect bona fide employee activity. Because the salted organizer can conceal its conflict of interest, both the employees and the employer may be misled to believe that the organizer is acting independently, when,

in fact, the organizer is merely doing what the union has paid it to do. It is the corruptness of this situation which is one of the reasons the law of agency provides that a paid organizer cannot, in good faith, become an employee of a targeted nonunion employer.

Indeed, compare the obverse of salting, i.e., employer placement of an employee in a union position to collect information and otherwise further the interests of the employer. That practice has been considered spying and industrial espionage. It caused a public outcry and its abolition was considered crucial by Congress. See, From The Wagner Act To Taft-Hartley: A Study of National Labor Policy and Labor Relations, H. Millis and Emily Clark Brown, at page 101. See also, Fruehauf Trailer Company, 1 N.L.R.B. 68, 73 (1935), in which the NLRB held that an employer violated the NLRA by having its employee apply for and obtain employment with the union that represented its employees.

The salting resolution herein requires the paid organizers planted on the payroll of the targeted nonunion employer to promptly and diligently perform the paid organizer's organizing duties. There is no suggestion of deference to tasks assigned by the targeted nonunion

employer. On the contrary, the member's organizing duties are paramount. Those duties take precedence over everything else. And, as soon as those organizing duties are completed, the salted paid organizer is pulled from the workforce of the targeted employer. It is apparent that the only reason the salted paid organizer is permitted to be on the targeted nonunion employer's payroll is to work for the union in furtherance of the union's interests in organizing the employer's employees. As aptly illustrated by Hansen's conduct at the Boise Cascade jobsite, a salted paid organizer cannot diligently and promptly perform organizing duties for the union and simultaneously perform the electrical work assigned by the nonunion employer in a diligent and prompt manner. Therefore, a paid union organizer governed by the salting resolution cannot become a bona fide employee of the targeted nonunion employer.

Any doubts regarding the conflicting interests of employers and unions in organizing drives are removed when current union organizing tactics are examined. See, e.g., the salting case discussed in the N.L.R.B. General Counsel's Report dated November 28, 1994 in which the "salts" engaged in a variety of protected disruptive activities in addition to what were considered in protected disruptive

activities, including slowdowns, intermittent strikes and sabotage which, together, caused the targeted employer to lose over \$100,000 and go out of business; and, "'Salting' the Contractors' Labor Force: Construction Unions Organizing With NLRB Assistance", by Professor Herbert R. Northrup in the Journal of Labor Research, Vol. XIV, Number 4, pp. 469-492 (Fall 1993), in which Professor Northrup observes at page 479, "The blunt memoranda from Michael Lucas, the IBEW salting chief, also clearly demonstrate that salters are often not interested in permanent employment. Rather, they frequently are devoted to harassment, destruction of productivity, or even in the case of a very successful open-shop builder like BE&K, elimination of the company itself unless it changes its ways and agrees to unionization." In other words, the salted organizer's objective is to use ostensibly protected and unprotected activity to inflict financial pain on the nonunion employer to force that employer to sign a union contract, without regard to the wishes of the employer's employees, or be forced out of business.

In the instant case, the Union sought to plant union organizers on the payroll of TCE, the targeted nonunion employer. The one salt who was effectively planted on

TCE's crew, Malcolm Hansen, spent much of his working time as a union organizer soliciting nonunion employees to join the Union instead of diligently working as an electrician as directed by TCE's foreman, notwithstanding the protests of those nonunion employees regarding Hansen's disruption of their work.

Contrary to the NLRB's assertion on page 7 of its Petition, Hansen was not financially dependent on the contractor for whom he ostensibly worked. The compensation Hansen received from the Union far exceeded that which he received from the contractor.

Hansen was not unlike an employee of a manufacturer competing for a billion dollar contract, who has been assigned to seek employment with the manufacturer's competitor to do whatever he or she is directed to do to assist the manufacturer to get that order away from its competitor. Likewise, Hansen's job, and the job of the other salts, if they were hired, was to do whatever they were directed to do to assist the Union in unionizing TCE without regard to the desires of TCE's employees.

The conflict of interest of the salted paid organizer is inherent in the paid organizer's relationship with the Union. That is why the law of agency provides that people with such

a conflict of interest cannot enter into a bona fide employment relationship with another employer with whom those interests conflict.

The NLRB, in an attempt to justify its failure to follow the common law definition of an employee, asserts that TCE can protect its legitimate interests by challenging the vote of the salted organizer and through the disciplinary procedure. In effect, the NLRB's position is analogous to the assertion that because a lawyer's clients can sue for malpractice, there shouldn't be any conflict of interest rules for lawyers. One of the reasons conflict of interest rules exist is because remedies after-the-fact are ineffective. Likewise, the employer remedies referred to by the NLRB are ineffective.

The NLRB has held that an employer can challenge the vote of a salted organizer in an NLRB certification election. However, that right is meaningless if the salt keeps the salt's relationship to the union secret. Member Kennedy, dissenting in the Oak Apparel case, noted that union organizers are not always candid about their relationship to the union. 218 N.L.R.B. 701, 702 (1975).

The NLRB has also held that an employer may restrict a salted organizer's work-disrupting organizational

activity. However, as TCE found in the instant case, in practice, the NLRB does not recognize an employer's right to enforce a no solicitation rule against a salted organizer.⁸

In fact, the NLRB has acknowledged that, in at least one situation, a union agent's conflict of interest is sufficient to disqualify the union agent from becoming an employee of an employer. In Sunland, *supra*, the NLRB held that the conflict of interest of an agent of a striking union disqualified him from being considered an employee of a struck employer. 309 N.L.R.B. at 1230-1231. Yet, the interests of that nonunion employer were only marginally different before the strike. As previously noted, the same economic battle that is fought on the picket line is carried on in the workplace. See, "'Salting' the Contractor's Labor Force," *supra*, and Report of the General Counsel dated November 28, 1994, *supra*. The salting resolution would be invoked in essentially the same manner in both situations. The NLRB's distinction between unions that are striking, and unions using similar strategies in the workplace, as described by Professor Northrup and in the NLRB General Counsel's Report

⁸ The Eighth Circuit found it unnecessary to rule on TCE's position that the NLRB improperly failed to uphold TCE's enforcement of its no solicitation rule. App. 10a-11a.

referred to hereinabove, to coerce a targeted nonunion employer into signing a labor contract without regard to the wishes of the employees of the nonunion employer, is not valid. Similarly, the NLRB's holding in the instant case that the Union's salting resolution doesn't prevent the paid union organizers from becoming bona fide employees of the targeted nonunion employer, is not valid.

CONCLUSION

The Eighth Circuit was careful to limit the scope of its decision. The Court made it clear that its decision did not apply to an applicant who, without being contractually obligated to do the union's bidding, was loyal to both the employer and the union. Such applicants would be employees within the meaning of the NLRA under the Eighth Circuit's decision.

However, under the union salting resolution in this case, a person bound by that resolution was not free to enter into a bona fide employment relationship with a nonunion contractor who was a target of the salting activity. Therefore, that person could not be considered an "employee" of that targeted nonunion contractor within the meaning of the NLRA.

The Eighth Circuit's decision is based on the salting resolution, which disposes of all the issues in the case. No other circuit has ruled on the effect of a salting resolution. Therefore, there is no conflict between the circuits on the basic issue in this case. There are other cases that are more directly based on the holding in the Zachry case and which would be a more appropriate vehicle for resolving the issue decided in the Zachry case, regarding which the circuits are split.

Therefore, we respectfully request that this Court deny the NLRB's Petition for a Writ of Certiorari herein.

Respectfully submitted.

James K. Pease, Jr.
[Counsel of Record]

Douglas E. Witte

December, 1994

3

Supreme Court U.S.
FILED

No. 94-947

JAN 5 1995

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In the Supreme Court of the United States

OCTOBER TERM, 1994

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

TOWN & COUNTRY ELECTRIC, INC., AND AMERISTAFF
PERSONNEL CONTRACTORS, LTD.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

**REPLY BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD**

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In the Supreme Court of the United States

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1. Respondent argues (Br. in Opp. 9-13) that certiorari should not be granted because the Eighth Circuit's decision is based on the "specific facts of this case relating to the Union's salting resolution." Respondent misinterprets the decision below.

The Eighth Circuit explained (Pet. App. 5a) that it must "first consider whether the two full-time union organizers were statutory employees and then decide the same issue for the other nine union members, including Hansen," who were not union officials but who stood to be reimbursed by the Union for organizing respondent's workforce. In deciding the first question, the Eighth Circuit did not refer at all to the Union's job salting

resolution. Rather, it recognized that “[t]he circuits are split” on the broader question of “whether paid union organizers are employees under the Act.” *Ibid.* The court then expressly endorsed the Fourth Circuit’s conclusion in *H.B. Zachry Co. v. NLRB*, 886 F.2d 70 (1989), that paid union organizers are not statutory “employees,” and rejected the contrary conclusion of the District of Columbia Circuit on that issue in *Willmar Electric Service, Inc. v. NLRB*, 968 F.2d 1327 (1992), cert. denied, 113 S. Ct. 1252 (1993). Pet. App. 7a. In agreement with *Zachry*, the Eighth Circuit thereupon held that an individual (such as the two union officials in this case) who works simultaneously for a union as a paid organizer and for a nonunion employer has an inherent conflict of interest which, under common law agency principles, precludes him from loyally serving the employer and thus being an “employee.” Thus, in the court’s view, the Act’s protections against antiunion discrimination did not extend to the two union officials. *Id.* at 6a-9a. The existence of the salting resolution played no role in that determination.

In holding that the second category of paid union organizers in this case—the nine union members who had applied for jobs (and in Hansen’s case, received one)—were also not statutory “employees,” the Eighth Circuit concededly identified as “[m]ost important” the fact that “these applicants were subject to Local 292’s job salting organizing resolution.” Pet. App. 9a.¹ But the court made it apparent that it would have reached the same result with respect to those members even had

¹ That resolution provided that members could work for non-union employers “only if they work for organizational purposes,” and that union members were to leave the nonunion job if the Union directed them to do so. Pet. App. 9a-10a.

there been no salting resolution. That is so for two reasons. First, before discussing the salting resolution, the court noted that the union members were “under [the Union’s] control” and had been encouraged by the Union “to apply and to organize [respondent’s] employees if hired,” and, significantly, that the Union had pledged to “pay those hired the difference between union scale and [respondent’s] wages as well as their travel expenses.” Pet. App. 9a. Under the reasoning of *Zachry*, which the Eighth Circuit had earlier endorsed in its opinion, the Union’s payment to those members during the course of their employment with respondent would create the same type of conflict of interest which had disqualified the two full-time paid union organizers from “employee” status under the Act.

Second, as we note in our petition (Pet. 27 n.13), the salting resolution does no more than explicitly recognize the leverage a union typically has over those of its members whom it has allowed to work at a nonunion employer. The resolution in no respect alters the reality that a union can often bring to bear significant economic pressure on a member to leave a nonunion job. For this reason, the Eighth Circuit’s acknowledgment (Pet. App. 10a) that a union member who zealously seeks to organize his fellow employees at a nonunion job is an “employee” protected by the Act is telling. The only meaningful distinction between that zealot and the union members here is that the latter are paid by the union and the former is not. A salting resolution does not enhance the control that the union already may exercise over its members by virtue of its standard constitution or bylaw provisions that prohibit members from working for non-union employers without permission and that provide for economic and disciplinary sanctions against members who flout that command. See *Florida Power & Light Co.*

v. *International Bhd. of Electrical Workers, Local 641*, 417 U.S. 790, 793 (1974). A union member who would seek to organize a nonunion employer, whether because he desires additional pay or acts out of zealotry, is simply not likely to work for a nonunion employer absent permission from the union—and if that permission is revoked, he is likely to resign.

In sum, the presence of the salting resolution does not materially distinguish this case from the other circuit court decisions concerning the status of paid union organizers, which respondent does not dispute are in conflict.² That resolution had no bearing on the Eighth Circuit's holding that the two full-time paid organizers were not statutory "employees," and it served only to buttress the court's conclusion that the nine union members who would have been reimbursed by the Union for their organizational activities were likewise not "employees." Accordingly, this case provides an

² Respondent does attempt (Br. in Opp. 12-13) to distinguish the District of Columbia Circuit's decision in *Willmar*, but that attempt is unavailing. In *Willmar*, the court held that a full-time union official, Hendrix, was a statutory "employee." 968 F.2d at 1329-1330. The court found no inherent conflict between a paid union organizer's duty to his union and his duty to the targeted nonunion employer. *Ibid.* The court reserved for another day the question of what circumstances would have to exist for an employer, notwithstanding a union-affiliated worker's "employee" status, to discharge that worker as disloyal under a neutrally applied policy of firing disloyal employees. *Id.* at 1330-1331; see also *id.* at 1330 (employer may not fire arsonist employee "by saying that arsonists are not 'employees'; it must prove that it would have fired the arsonist even if he hadn't been engaged in union-related activities"). Thus, the court refused to hold, as the Eighth Circuit did here, that financial ties between a worker and a union would deprive the worker of "employee" status under the Act.

appropriate vehicle for this Court to decide the legal question of whether a paid union organizer is an "employee" under Section 2(3) of the National Labor Relations Act. Indeed, as we have noted (Pet. 27-28), this case, unlike others that have raised that question, has the singular advantage of presenting that issue in several distinct factual contexts, helping to ensure that the Court's resolution of that issue will not prove factbound.

2. Respondent also contends (Br. in Opp. 13-24) that the court of appeals' decision is correct, for the reason that a conflict of interest is invariably created when a paid union organizer works for an employer whom the union seeks to organize. Respondent's contentions are unpersuasive.

a. Respondent first notes (Br. in Opp. 16) that the relationship between a nonunion employer and a union seeking to organize its employees is often adversarial.³ From this truism, respondent concludes that a paid union organizer will therefore invariably "serve the interests of his primary master, the union, by acting adversely to the interests of the targeted nonunion employer while masquerading as an employee of that employer." *Id.* at 16-17. Respondent's broad assertion that the adversarial relationship between a union and an employer mandates holding paid union organizers not to be statutory "employees," and hence subject to antiunion discrimination, is at odds with the fundamental premise

³ Respondent relies for this proposition (Br. in Opp. 16) upon Board Member Oviatt's concurring opinion in *Sunland Construction Co.*, 309 N.L.R.B. 1224, 1232 (1992). Respondent does not mention that Member Oviatt agreed with the Board's conclusion that paid union organizers are statutory "employees." See Pet. 27 n.12.

of the Act itself, that "[p]rotection of the workers' right to self-organization does not curtail the appropriate sphere of managerial freedom; it furthers the wholesome conduct of business enterprise." *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 182 (1941). As the Board explained (Pet. App. 38a) in this case:

The statute is founded on the belief that an employee may legitimately give allegiance to both a union and an employer. To the extent that may appear to give rise to a conflict, it is a conflict that was resolved by Congress long since in favor of the right of employees to organize.

Moreover, as we have noted (Pet. 20), the Act leaves the employer entirely free to discipline or discharge a union-affiliated employee for misconduct or lack of productivity, see also *Willmar*, 968 F.2d at 1330, and to prohibit union solicitations during working time.⁴ Indeed, in

⁴ Respondent mistakenly asserts (Br. in Opp. 23) that the Board demonstrated in this case that it "does not recognize an employer's right to enforce a no solicitation rule against" a paid union organizer. There is no evidence in the record that respondent maintained a rule barring solicitation during working time. Rather, the Board found, based on the evidence credited by the administrative law judge, that respondent's project superintendent threatened union member Hansen with discharge if he continued to talk about the Union. See Pet. 5. Respondent's contention (Br. in Opp. 6) that Hansen engaged in union activity during work time is based on testimony discredited by the ALJ and the Board. Pet. App. 85a, 91a-94a, 109a-110a.

Respondent misrepresents the Board's decision in other respects. For example, respondent contends that "[e]ssentially the only basis" for crediting the union's witnesses was the ALJ's "improper presumption that all nonunion employers will discriminate against people affiliated with a union which might attempt to unionize them." Br. in Opp. 5 n.3; see also *id.* at 7 n.4. The ALJ

the job salting case to which respondent adverts (Br. in Opp. 19-20, 23 (citing NLRB General Counsel's Report (Nov. 28, 1994), Daily Lab. Rep. (BNA) No. 226, at D-1, D2-D3 (Nov. 28, 1994)), the General Counsel refused to issue a complaint regarding the discharge of paid union organizers who engaged in misconduct on the job. That case illustrates that employers already have broad authority, under the Act, to respond to any abuses by employees who happen to be paid union organizers.

b. Respondent analogizes a union's practice of allowing members to serve as paid organizers at a nonunion employer to an employer's use of employees to spy on other employees' union activity. Br. in Opp. 18. That analogy is fundamentally inapt. An employer's use of "spies" violates the Act because it tends to coerce and restrain employees' organizational activity while vindicating no legitimate employer objective. See *Fruehauf Trailer Co.*, 1 N.L.R.B. 68, 73, 77-78 (1935). By contrast, organizational activity on behalf of a union "is at the very core of the purpose for which the [Act] was enacted." *Sears, Roebuck & Co. v. San Diego County Dist. Council of Carpenters*, 436 U.S. 180, 206 n.42 (1978); see also *American Hosp. Ass'n v. NLRB*, 499 U.S. 606, 609 (1991).

c. Finally, respondent errs in asserting (Br. in Opp. 23) that the situation in this case is only "marginally different" from a strike setting, in which, the Board has

made no such presumption. Rather, his decision (Pet. App. 43a-133a) sets out an ample factual basis for his findings of antiunion discrimination, including respondent's opposition to the unionization of its employees. See *R.J. Lallier Trucking v. NLRB*, 558 F.2d 1322, 1325 (8th Cir. 1977) ("a general bias or hostility toward the union * * * are [sic] proper and highly significant factors for Board evaluation in determining motive").

stated, an employer's refusal to hire a paid organizer does not violate the Act. See *Sunland Construction Co.*, 309 N.L.R.B. 1224 (1992) (cited at Pet. 18 n.10). In *Sunland*, the Board reasoned that the employer has a "substantial and legitimate" interest in refusing to place on the payroll a person who would immediately begin encouraging other employees to withhold their services. 309 N.L.R.B. at 1231. The Board observed that it was rational to presume that "someone who is being paid by the organization that is seeking to induce employees to withhold services would not be inclined wholeheartedly to provide services for the duration of the organization's efforts." *Id.* at 1231 n.41. It is equally rational, however, for the Board to have concluded that, in the nonstrike context, "there is [no] inherent conflict between carrying out the duties of an employee and operating as a paid union organizer." *Ibid.*

For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

FREDERICK L. FEINSTEIN
General Counsel
National Labor Relations Board

JANUARY 1995

BEST AVAILABLE COPY

In the Supreme Court of the United States

OCTOBER TERM, 1994

No. 94-947

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

TOWN AND COUNTRY ELECTRIC, INC., AND
AMERISTAFF PERSONNEL CONTRACTORS, LTD.

*ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT*

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CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

**Board Case Nos. 18-CA-11035,
18-CA-11044 and 18-CA-11080**

**In the Matter of: TOWN & COUNTRY ELECTRIC, INC., AND
AMERISTAFF PERSONNEL CONTRACTORS, LTD.**

Date	Documents
9/25/89	Initial Charge
11/16/89	Complaint
11/29/89	Answer
12/11-14/89	Hearing
9/18/90	Administrative Law Judge's Decision
12/16/92	Decision and Order of the NLRB
8/31/94	Decision of the Court of Appeals
8/31/94	Judgment of the Court of Appeals
11/23/94	Petition for Writ of Certiorari filed
1/23/95	Petition for Writ of Certiorari granted

BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION EIGHTEEN

In the Matter of:

Case No. 18-CA-11035

TOWN & COUNTRY ELECTRIC, INC., AND
AMERISTAFF PERSONNEL CONTRACTORS, LTD., RESPONDENT,

and

CHARLES EVANS, AN INDIVIDUAL, CHARGING PARTY.

Case No. 18-CA-11044

TOWN & COUNTRY ELECTRIC, INC., AND
AMERISTAFF PERSONNEL CONTRACTORS, LTD., RESPONDENT,

and

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS,
LOCAL 292, AFL-CIO, CHARGING PARTY.

Case No. 18-CA-11080

TOWN & COUNTRY ELECTRIC, INC., AND
AMERISTAFF PERSONNEL CONTRACTORS, LTD., RESPONDENT,

and

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS,
LOCAL 343, AFL-CIO, CHARGING PARTY.

Monday, December 11, 1989

[2] Room 471
Federal Building
110 South 4th Street
Minneapolis, Minnesota

The above-entitled matter came duly on for hearing pursuant to notice, at 2:55 p.m.

BEFORE: THE HONORABLE JOEL A. HARMATZ
Administrative Law Judge

APPEARANCES:

*On behalf of the General Counsel
National Labor Relations Board:*

FLORENCE I. BRAMMER, ESQ.

Region Eighteen, National Labor Relations Board

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On behalf of the Respondent – Town & Country:

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5430 River Hills Road

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On behalf of the Charging Party:

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Gordon, Miller & O'Brien

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Minneapolis, Minnesota

[3]

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PROCEEDINGS

2:55 p.m.

JUDGE HARMATZ: The hearing will be in order.

This is a proceeding before the National Labor Relations Board, Division of Judges, Washington, D.C., Joel A. Harmatz, Administrative Law Judge, presiding in the matter of Town & Country Electric, Inc., and Ameristaff Personnel Contractors, Ltd., and Charles Evans, an Individual, Case 18-CA-11035, consolidated with Town & Country Electric, Inc. and Ameristaff Personnel Contractors, Ltd. and International Brotherhood of Electrical Workers, Local 292, AFL-CIO, Case No. 18-CA-11044, consolidated with Town & Country Electric, Inc. and International Brotherhood of Electrical Workers, Local Union 343, Case No. 18-CA-11080.

I will now take the appearances on behalf of the parties. For the General Counsel?

MS. BRAMMER: Yes, Florence I. Brammer, NLRB Region 18, 110 South 4th Street, Federal Building, 316, Minneapolis, Minnesota 55401.

JUDGE HARMATZ: For the Charging Party?

MR. GORDON: For the Charging Party, IBEW Local 292 and IBEW Local 343, Stephen, S-T-E-P-H-E-N, D. Gordon, G-O-R-D-O-N, Gordon Miller and O'Brien, O-'B-R-I-E-N, 1208 Plymouth Building, Minneapolis 55402.

JUDGE HARMATZ: For the Respondent, Town & Country

[5] MR. PEASE: Attorney James K. Pease, Jr., the Law Firm of Melli, Walker, Pease and Ruhly, S.C., of Madison, Wisconsin, P.O. Box 1664. Zip Code 53701.

JUDGE HARMATZ: And for the Respondent, Ameristaff?

MR. SEEHAWER: Attorney Garth Seehawer, 5430 River Hills Road, Racine, Wisconsin 53402.

JUDGE HARMATZ: Ms. Brammer, the formal papers?

MS. BRAMMER: Yes. I offer into evidence the formal papers. They have been marked as General Counsel Exhibit 1(a) through 1(r), 1(r) being an Index and Description of the entire document, and it has been shown to all parties prior to this proceeding.

JUDGE HARMATZ: Okay. Other than the one thing you mentioned, is there any objection?

MR. PEASE: No, sir.

JUDGE HARMATZ: Okay. There being no objection, General Counsel's 1(a) through (r) inclusive is received.

(The document referred to, having been previously marked for identification as General Counsel's Exhibit No. 1(a) through 1(r), was received into evidence.)

JUDGE HARMATZ: Okay. Ms. Brammer, further preliminaries?

[15] JUDGE HARMATZ: All right. The hearing will be in order.

Ms. Brammer?

MS. BRAMMER: Okay. I am ready to call my first witness.

MR. PEASE: You've got a bunch of witnesses that are sitting in there.

MS. BRAMMER: Okay. Roger, would you go wait on the third floor in the reception area? Thank you. We'll get you as soon as we can, and Don, you too, yes.

(Pause.)

JUDGE HARMATZ: Okay. The hearing will be in order.

MS. BRAMMER: Michael Priem.

JUDGE HARMATZ: Michael Priem.

Whereupon,

MICHAEL PRIEM

having been first duly sworn, was called as a witness herein and was examined and testified as follows:

DIRECT EXAMINATION

BY MS. BRAMMER:

Q Who are you employed by?

A IBEW Local 292.

Q What is your position with them?

A Business representative.

Q How long have you held that?

A Seven plus years.

Q Are you a licensed electrician?

[16] A Yes, I am.

Q What sort of license do you hold?

A Class A Minnesota Journeyman's License.

Q And how long have you held that?

A Since 1975.

Q I'm going to ask you some questions about Local 292. Do you know when Local 292 was chartered?

A I believe it was 1902.

Q And is that affiliated with an international?

A Yes, it is, AFL-CIO, CLC and IBEW International Local.

Q How many bargaining units are represented by Local 292?

A I would say approximately sixty separate contracts.

Q Do you know approximately how many employees are encompassed by those contracts?

A Total membership in Local 292 I would estimate at approximately 3,700.

Q To what extent are employees involved in Local 292?

A The executive board, collective bargaining, all the way down, running the local. Everybody is involved.

Q Do you have a constitution and bylaws?

A Yes.

Q I'm showing you what has been marked as General Counsel Exhibit 2. Can you take a look at that and identify what that is?

(The witness was proffered the document.)

[17] A Ad for licensed journeyman electricians.

Q Have you seen this ad?

A Yes, I have.

Q And this was an advertisement in what publication?

A The *Star and Tribune* Sunday edition, September 3rd, 1989.

MS. BRAMMER: I would offer General Counsel Exhibit 2.

JUDGE HARMATZ: Any objection?

MR. PEASE: I have no idea what its materiality is. I object on materiality.

JUDGE HARMATZ: Well, if I use my imagination slightly I could grasp it. Overruled.

General Counsel's Exhibit is received.

(This document referred to, having been previously marked for identification as General Counsel's Exhibit No. 2, was received into evidence.)

BY MS. BRAMMER:

Q Did you have occasion to go to the Embassy Suites Motel in Bloomington, Minnesota, on September 7th, 1989?

A Yes.

Q Okay. For what purpose?

A In response to this advertisement in the *Star and Tribune*. It was an interview process for Ameristaff for—and Town & Country Electric for licensed journeyman [18] electricians.

Q Do you know—

JUDGE HARMATZ: Did you call the phone number?

THE WITNESS: No, I didn't call the phone number myself.

JUDGE HARMATZ: So you heard from somebody else—

THE WITNESS: Right.

JUDGE HARMATZ: —about this meeting at the—

THE WITNESS: Right.

JUDGE HARMATZ: Okay.

BY MS. BRAMMER:

Q How did you know that there was going to be a meeting concerning Ameristaff at the Embassy Suites on September 7th?

A Several of my members had called the number and discovered that the interview process was supposed to take place at 10 a.m. on the morning of September 7th at the Embassy Suites on 34th in Bloomington.

Q What time did you arrive there?

A I would estimate I arrived there at approximately 8:30 that morning.

Q Would you describe what happened beginning at the time you arrived there?

A Sure. I arrived there at approximately 8:30 in the morning and went to the front desk, and at that time I asked if there were representatives from either Town & Country or Ameristaff present at the hotel. And nobody really knew for [19] sure that either Ameristaff or Town & Country Electric was even going to be there at that time at

the front desk. So consequently I at that time went to the other Embassy Suites on the other end of town, on the other end of the Bloomington Strip, to check to see if Town & Country or Ameristaff had anything on schedule at the other one.

They didn't hear anything so I returned to the 34th Avenue at which time the gal behind the front desk said, "Yes, they had heard from Ameristaff and Town & Country. They would be an hour late. They got fogged in in Appleton, Wisconsin, and asked that we just remain at the hotel until they got there". At that time she had a list of names, maybe five or six names, on a little piece of paper just taped to her desk. So at that time we waited.

Q Okay. You say "we". Who was with you at that time?

A I arrived with Greg Shafranski, another business rep from Local 292.

Q And at that time it was just the two of you?

A Yeah, I believe we were probably the first two there.

Q Okay. Did other people arrive?

A Yeah, they—other people after 10 o'clock started arriving.

Q Who else arrived?

A Well, there was approximately thirteen other people that I knew.

[20] Q Can you name those?

A Ken Axt. Of course, Greg Shafranski was already listed. Don—Red Larson, Steve Claypatch, Roger Chartrand, Steve Leyendecker, David Hagen, Robert Ahlman, Bob Printy, Steve Shannon, Craig Jones.

Q Do you recall—

A There was a Weseman that had showed up. I don't recall his first name.

Q Do you recall whether Malcolm Hansen was there?

A Yes, Malcolm Hansen.

Q Do you recall whether Harley Barton was there?

A Harley Barton was there.

Q When did Steve Shannon arrive?

A I believe he arrived after the interview process or the—not the interview process, but the application process had taken place, and so he was—he arrived basically when a lot of the people were leaving so he was a little late.

Q At what point did the individuals who you had been told were fogged in arrive?

A Approximately 11 o'clock that morning.

Q And would you describe what happened when they arrived?

A We were all waiting in the downstairs lobby and the individuals from Town & Country and Ameristaff arrived. We were sitting on the various couches and chairs that were available. They came over and introduced themselves as Ron [21] Sager, Dennis Defferding and Steve Buelow from Ameristaff, and Ron Sager and Defferding or Defferding from Town & Country Electric. At that time they introduced themselves, who they were, who they represented, stated that they had two rooms rented up on the ninth floor. They were late. They apologized for being late, fogged in in Appleton, and stated, "Let's go upstairs and get started".

Q And did you go upstairs?

JUDGE HARMATZ: Can I interrupt at this point because there is something important that crossed my mind.

I don't believe that we have taken care of the pleadings on jurisdiction. When you listed the stipulation, I don't think—I'm just going back to my—our conference call. Wasn't jurisdiction denied? I never did see—

MS. BRAMMER: Yes, it was. In one of my motions to amend, paragraph 3(b), and Ameristaff also amended its answer to admit that.

JUDGE HARMATZ: I don't remember that was on the record.

MS. BRAMMER: I believe that was on the record at the time I made the other amendments. Were those on the record?

JUDGE HARMATZ: All the amendments were on the record. All the stipulation were on the record.

MS. BRAMMER: And that was—

JUDGE HARMATZ: I don't believe I had a specific request to amend the answer to admit the jurisdictional paragraphs of [22] the complaint as amended.

MR. SEEHAWER: I think at the point that that paragraph was amended, we stated that Ameristaff's answer would be amended to admit that paragraph as amended.

JUDGE HARMATZ: Okay. All right. I think that you did say something.

MR. SEEHAWER: Yes.

JUDGE HARMATZ: Do we have a denial on Town & Country?

MS. BRAMMER: No.

JUDGE HARMATZ: Okay. So Town & Country admitted the paragraph pertaining to it?

MR. PEASE: No. Well, there is one part that is inaccurate. We denied that, but the other part is accurate and in my opinion is sufficient to satisfy the Board's jurisdictional requirements. So we admitted jurisdiction.

(Pause.)

JUDGE HARMATZ: Okay. So you admit the info? Okay. All right, sorry.

Okay. Now we go upstairs. Could you tell us what happened upstairs?

THE WITNESS: We proceeded to ride the elevator upstairs. Rooms 904 and 905 were rented. We all went into I believe it was 904 where there were refreshments set up, tables, round tables were set up for the purpose of people sitting and filling out applications. Ron Sager at that time entered the [23] room and explained to us the benefits of Town & Country, what they had to offer as far as health care plans, 401(K) plans, zero deductible on the health care, if you get hurt at home or away from home you are still covered. Safety, shoes, eyeglasses. They provide company tools. The only thing that would be necessary would be the hand tools. Typical, you know, electrician's hand tools.

And when Ron had finished, at that time Steve Buelow from Ameristaff handed out applications and we proceeded to fill out the applications.

BY MS. BRAMMER:

Q Showing you what has been marked as General Counsel Exhibit 3, can you describe what that is?

(The witness was proffered the document.)

A These are the applications that we filled out in the room that day.

MS. BRAMMER: Offer General Counsel Exhibit 3.

JUDGE HARMATZ: Is that a blank copy?

MS. BRAMMER: Yes.

JUDGE HARMATZ: Is that blank?

MS. BRAMMER: Yes.

MR. PEASE: No objection.

JUDGE HARMATZ: General Counsel's 3 is received.

[24] (The document referred to, having been previously marked for identification as General Counsel's Exhibit No. 3, was received into evidence.)

BY MS. BRAMMER:

Q Did you fill out the application?

A Yes.

Q Did the people whose names you recited earlier in your testimony fill out applications?

A The majority of them did. I believe some people that arrived late weren't given the opportunity to fill out applications.

Q Do you know who they were?

A Steve Shannon, I believe was one. I'm not positive as to whether or not Bob Printy. I believe Bob did fill out an application, but I think he was late getting there, and I'm not quite sure if, you know, who else had — was denied the opportunity to fill out an application.

Q Do you know if Roger Chartrand filled out an application there?

A I believe he did. I'm not sure whether Roger filled out an application or not.

JUDGE HARMATZ: Were you present when they were denied this opportunity?

[25] THE WITNESS: Yes, I was still there when some of the people came late.

JUDGE HARMATZ: Was there anything said either by Ameristaff or Town & Country as to why?

THE WITNESS: I wasn't in the room when they went into the room to get an application. The only thing that, you know, they responded to me —

MR. PEASE: Object. Hearsay.

JUDGE HARMATZ: Okay.

BY MS. BRAMMER:

Q After you filled out your application, what happened?

A The applications were gathered up by Steve Buelow and taken to the other room where the representatives from Town & Country had gone to set up for the actual interview process. We waited for a while. I believe Steve Buelow came back and got Gary Weseman for an inter-

view. Weseman went for the interview process and was gone. I didn't see him again. Approximately 15-20 minutes went by. Steve Buelow returned to the room, asked the question whether or not we were looking for all union work or nonunion work, and I stated, "Well, you know, we're going to do anything that you've got. We're here to apply for this project and we'll do anything you got."

At that time I believe Steve left. Can I back up just a little bit here? During the process of when everybody was filling out the applications, several questions, I believe, [26] were asked of Steve, you know, "How many people are we looking for, when are they going to start, when —", you know, questions like that. His response was they needed eight people immediately for this project.

The project, of course, from what was advertised in the paper was assumed that it would be a two year project, and so consequently the applications were gathered up. Then Steve returned and asked again, "Are you looking for all union work?" And we stated, "No, we'll do anything you got. You know, we are all licensed journeyman in this room, qualified, and we are here for applications and interview process for this project".

He left, came back approximately 10-15 minutes later, and at this time he had a list of names with him, and he read off the list of names. There were probably eight names, roughly, in that vicinity. Pat Stack was on that list. David Rasmeth was on that list. Bill Betsler was on that list of names.

Q Was anyone on that list in the room?

A No. No one was there that was on that list. And at that time Steve said, "Well, these are the people that had appointments and we don't know if we can interview the rest of you because you didn't have appointments." And at that time I stated, "Well, we can take the place of the people that have appointments. You were prepared at least to

interview eight people if you have a list of names for eight people, and we've [27] certainly got that many licensed journeymen here in the room."

At that time Steve left again and went back to the interview room, and returned again. At this time Ron Sager was with him, and Ron reiterated what Steve had said, "We are only going to interview people that had appointments and the rest of you people—we are asking everybody to leave if you don't have an appointment."

And I believe at that time Malcolm Hansen stated, "Look, I called the 414 number. I drove in from Buffalo 70 miles and I want my appointment. I came here for an interview. They told me to show up and I would like—I'm here for a job and I'm here for my interview, and I'm not going to leave until I get an interview."

Ron Sager stated at that time, "If you people refuse to leave, we'll call the local authorities and have you removed."

Q Was anything said about the customer during Ron Sager's remarks when he came into the room?

A Yes. They had stated to us that we can't hire signatory people as per our customer on this project.

Q And did Malcolm Hansen then get an interview?

A Yes. Malcolm was given an interview, at which time I told the rest of the people, "It doesn't look like anybody is going to get an interview with this company so there is no sense really sticking around, I guess", and at that time the rest of the people started to leave. I believe that is [28] approximately when Steve Shannon came in, you know, some time in that time frame.

Mick Hansen—Malcolm Hansen at that time went for an interview in Room 905. He was in there for approximately 15-20 minutes. I'm just judging. He came out, and I believe he went back in for a second interview. Greg

Shafranski and myself waited until that process was done and then we also left.

Q At any time during that process, did you ask what would happen to the applications that were completed?

A I asked Steve Buelow—

MR. PEASE: I am going to object. I don't know that she has exhausted his memory on these things.

JUDGE HARMATZ: That's preliminary. Overruled.

THE WITNESS: I asked Steve Buelow during the—when he came back with Ron Sager. He said, "You know, well, we've got both union work and nonunion work. We don't know when the union work is coming." And I asked Steve at that time, "Well, what are you going to do with our applications?" "Well, we are going to put those applications on file and we'll wait for the union work," and he didn't know where or when that union work was coming.

BY MS. BRAMMER:

Q To what extent did you observe that Steven Buelow from Ameristaff was involved in the interviewing process on [29] September 7th?

A None at all. He wasn't involved in the interview process to my knowledge at all. The only—the representatives from Town & Country were involved in the interview process.

Q Was anyone else from your observations interviewed that day other than this Mr. Weseman you referred to and Malcolm Hansen?

A To my knowledge Craig Jones, I guess, was given an interview, and I guess Craig told them that he had to leave early, he had to pick up his kids, and was given an interview and left right away. I didn't see Craig after that.

Q Are any of the twelve employees you named employed by Local 292?

A Not directly. Steve Claypatch is a member of the executive board and he is not a full time officer of the local executive board. It is basically a voluntary position. They get paid one hour a month per meeting, executive board meeting.

Q And how about Greg Shafranski, the man you said you came with?

A Greg Shafranski is a full time paid business representative.

JUDGE HARMATZ: One thing I do require that I should have told you in advance, I want these exhibits tabbed with these little tabs that you can get at any five and ten cent store, [30] that are gummed, they stick out about this far. I wish I—normally I carry them with me. Anything that is going to—no, no, I'm talking about index tabs. I want all the exhibits marked because I have too much trouble running through these documents that are all the same size due to our copying situation. If you don't know what I'm talking about, let me know and—

MS. BRAMMER: I do know. May I continue to offer them?

JUDGE HARMATZ: Yes.

MS. BRAMMER: And then I can take them back and have them here tomorrow.

JUDGE HARMATZ: Oh, yes. No problem.

MS. BRAMMER: Okay.

BY MS. BRAMMER:

Q Showing you what has been marked as General Counsel Exhibit 4, have you ever seen that?

(The witness was proffered the document.)

A Yes, I have.

Q What is it?

A It's another ad placed in the *Star and Tribune*, Monday, September 11th issue, for licensed journeyman elec-

tricians. The same telephone number as the previous ad placed in the *Tribune* on Sunday, September 3rd.

MS. BRAMMER: Offer General Counsel Exhibit 4.

JUDGE HARMATZ: No objection? Mr. Pease?

[31] MR. PEASE: No objection.

JUDGE HARMATZ: General Counsel's 4 is received.

(The document referred to, having been previously marked for identification as General Counsel's Exhibit No. 4, was received into evidence.)

BY MS. BRAMMER:

Q You referred to the fact that all the applicants at the Embassy Suites on September 7th were licensed. Is that a license issued by the state?

A Yes.

Q Okay. Could you describe what the criteria are for licensure in Minnesota?

A Eight thousand hours of verifiable time acceptable to the State Board of Electricity and the passing of the Class A Journeyman Electrician's License test.

Q As business manager for Local 292, are you aware of Minnesota State Statutes that pertain to electrical work?

A Yes.

Q Okay. What is the significance of being licensed regarding those statutes?

A State law requires any electrical contractor doing work for another in this state must have a licensed electrician on the project. There must be a master licenseholder backing up [32] the licensed electrical contractor.

Q Showing you what has been marked as General Counsel Exhibits 5 and 6, and referring you to General Counsel Exhibit 5 first, can you take a look at that and identify what that is?

(The witness was proffered the documents.)

A This is a letter that I had typed up, signed and sent to Town & Country Electric, Appleton, Wisconsin.

Q And does that date of September 14th accurately reflect when you sent that?

MR. PEASE: I object. It appears on its face that it is a certified letter. I would submit that the best evidence would be the certified receipts, both of mailing and receipt.

MS. BRAMMER: I'll be glad to offer that. At this time I'll —

JUDGE HARMATZ: I'll overrule the objection. The letter suffices. The copy of the letter suffices.

MS. BRAMMER: I would offer General Counsel Exhibit 5.

JUDGE HARMATZ: Any objection other than that, Mr. Pease?

MR. PEASE: No, sir.

JUDGE HARMATZ: General Counsel's 5 is received.

[33] (The document referred to, having been previously marked for identification as General Counsel's Exhibit No. 5, was received into evidence.)

MS. BRAMMER:

Q And looking at General Counsel's 6, is that a response to General Counsel Exhibit 5?

A Yes, it is.

Q Did you receive that?

A Yes, I did.

Q And attached to that are six pages. Did those come with that response?

A Yes.

MS. BRAMMER: Offer General Counsel Exhibit 6.

JUDGE HARMATZ: Any objection?

MR. PEASE: No.

JUDGE HARMATZ: General Counsel's 6 is received.

MR. PEASE: Is counsel going to —

JUDGE HARMATZ: Could I upset everybody here by renumbering General Counsel Exhibit 5 5(a), General Counsel's 6 5(b)? Let's have everything that pertains to multiple exhibits that pertain to the same subject matter under alphabetized subnumbers. Subletters.

MR. PEASE: Is counsel going to submit the mailing [34] receipts and return receipts?

MS. BRAMMER: I wasn't planning on it, no.

JUDGE HARMATZ: I don't think it is necessary. I'll take the witness' testimony.

MS. BRAMMER: No further questions.

JUDGE HARMATZ: 5(a) and 5(b), right.

(The documents referred to, having been previously marked for identification as General Counsel's Exhibit No. 5(a), formerly 5, and 5(b), were received into evidence.)

JUDGE HARMATZ: Off the record.

(Off the record.)

JUDGE HARMATZ: On the record.

MR. PEASE: Do you have any affidavits by Priem?

MS. BRAMMER: Yes, I do.

JUDGE HARMATZ: Off the record.

(Off the record.)

JUDGE HARMATZ: On the record.

Go ahead, Mr. Gordon.

MR. GORDON: Should I proceed, Your Honor?

JUDGE HARMATZ: Proceed.

[35]

CROSS-EXAMINATION

BY MR. GORDON:

Q Mr. Priem, when the representatives from Ameristaff and Town & Country initially entered the building, the Embassy Suites, how would you describe their initial reaction toward seeing you and the group that was waiting?

A They were—they were ecstatic that we were there, that they had a group of people that were there.

Q And at that point in time in the lobby, was anything said or asked about having appointments to be interviewed?

A No.

Q Okay. And then I think you testified that the next thing that happened was that you went up in the elevator?

A Right.

Q And were you given applications or did you have to go in the room to get them?

A We went into the room. To I believe it was 904.

Q Now at the time you were given the applications, were you asked anything about having an appointment?

A No.

Q And after you—you then filled out the application?

A Right.

Q And gave it back in?

A Yes. Steve Buelow collected all the applications.

Q At the time he collected the applications, did he say [36] anything about or ask anything about individuals having appointments?

A No.

Q When is the first time that the subject of appointments is raised?

A I believe this was the second time that he re-entered the room. After gathering up the applications, leaving to go to Room 905 where the representatives from Town & Country had set up, he returned and then read off the list of names, and no one was there. Left and returned again. At that time is when he mentioned something about 'not going to interview unless you have appointments'.

Q Okay. And with respect to being available for work, were you available for work?

A Yes.

Q If you had been offered a job, would you have taken it?

A Yes.

Q As far as you know, is that true of the other individuals that were there?

A Yes.

MR. GORDON: That's all I have, Your Honor.

JUDGE HARMATZ: Okay. Now you are going to give the affidavit?

MS. BRAMMER: Yes. I have a four page—what is it, a Board affidavit, and then also an additional written statement

[43] BY MR. PEASE:

Q It's my understanding that as a business representative, you have—you are paid a salary. Is that correct?

A Correct.

Q Is that an elective office or is it a—

A It's an appointed office.

Q Have you continued in that office since the time that the incidents herein took place?

A Yes.

Q Isn't it true that in the event that you would have been hired, that you would have remained in your position as business representative during that time?

A Possibly.

Q Isn't it also true that there is a provision in the union's constitution and bylaws that prohibits members in essence from working for a nonunion employer unless they are authorized to do so?

A I believe you are correct.

Q And isn't it true that one of the reasons for which the local union will permit employees to work for a non-union employer is in order to organize that employer?

MR. GORDON: Objection. Objection, Your Honor. This line of questioning is not relevant to any germane is-

sue in this case. It doesn't make any difference whether the IBEW constitution permits or does not permit whether he was a full [44] time paid union representative or not. That is the well established Board precedent.

JUDGE HARMATZ: Well, it is not so well established. As a matter of fact, it is on relatively shaky footing at the moment for a number of reasons. First of all, we've got this adverse Supreme—I mean adverse court decision in *Zachry*, number one, and number two, we've got three new Board members coming aboard. So as far as I'm concerned, anything that would support a colorable argument is coming in in all my cases—in all my cases.

I can't understand why the Respondent in any of these cases shouldn't be able to establish a disability anyway.

MR. PEASE: I would ask that—if we could go off the record for a moment, please?

JUDGE HARMATZ: Off the record.

(Off the record.)

JUDGE HARMATZ: On the record.

MR. PEASE: I would then reserve, if I may, the right to recall this witness as part of our case.

JUDGE HARMATZ: Right. You can do that.

MR. PEASE: Thank you, sir.

JUDGE HARMATZ: But you can—you know, I mean you can carry on your—we know that the prohibition exists, and if you want to cross-examine him, I don't see any reason why you should be constrained with not cross-examining. Maybe when [45] you get the documents, you'll see that you won't have to call if you question him fully at this time.

MR. PEASE: Okay, fine. Are we on or—

JUDGE HARMATZ: On the record.

BY MR. PEASE:

Q Isn't it true that the local has by formal action agreed to authorize members to work for nonunion contractors for the purpose of organizing those contractors?

A Yes.

Q And isn't it true that in the absence of that authorization, that their engaging in that activity would cause them to be subject to discipline?

A Yes.

Q And perhaps expulsion from the union?

A I guess that's hypothetical. Depends on how the executive board would rule.

Q Isn't it true that the local union continues their fringe benefits while they are employed by a nonunion employer? Their union fringe benefits?

A I don't know how other locals operate. It could be true and it could not be true. There may be all or a portion of benefits that the local would be willing to pay.

Q Isn't it true that an employee who went to work for Town & Country Electric would be paid the difference between what—the rate that Town & Country paid them and what the union [46] scale was for the work that they performed?

A Yes.

Q And they get paid that by the local union?

A Yes.

Q Isn't it also true that you would expect those people to, the union members who were hired, to keep in touch with you as to what was going on on the project?

A Yes.

Q And to continue to carry out their organizing activities?

A Yes.

Q And that would be their purpose?

A Yes.

Q Were they also paid union travel pay for their travel up to the job?

MS. BRAMMER: Your Honor, objection. Could we have some foundation here as to dates or names of people for whom payment was being referred?

JUDGE HARMATZ: No, it's not necessary. He is talking about union policies.

THE WITNESS: We don't have a set policy if you are talking about union policy. I guess I would answer that question with every case would be different.

JUDGE HARMATZ: How could you do that?

THE WITNESS: We would look at the—

JUDGE HARMATZ: How could you make distinctions between [47] members on a specific job in paying some travel pay and not paying other travel pay?

THE WITNESS: Is he talking about one specific job?

JUDGE HARMATZ: We are talking about the job in International Falls.

MR. PEASE: Let's talk Boise Cascade job.

THE WITNESS: Generally.

BY MR. PEASE:

Q Let's talk the Boise Cascade job in International Falls. Would employees hired to work at that job be paid the—from the union be paid the travel expense per diem?

A They would have been paid the mileage, yes.

Q By the union?

A Right.

Q To what extent were these people, the union people that you asked to come to the interview, paid for being at the interview?

A None.

Q Did they get any expenses for their travel?

A No.

Q None of them?

A None of them.

Q Did they get any per diem?

A No.

Q In your local, is there a release procedure, a formal [48] release procedure, that is followed when an employee is authorized to go to work for a nonunion employer?

A No.

Q It is just a verbal. Is that adequate?

A Yes.

Q So there wouldn't be any written record of those cases?

A No.

Q But these people who went to that interview on the 7th of September, they all had releases from you?

A Yes.

MR. PEASE: I have no further witnesses—questions of this witness at this time. I would, however, reserve the right to call him back after we resolve the subpoena issue.

MR. SEEHAWER: One or two very short questions.

CROSS-EXAMINATION

BY MR. SEEHAWER:

Q In your handwritten affidavit you also refer to later newspaper advertisements showing the ad by number which you identify as Town & Country, is that correct?

A Right.

Q Do you recall the dates on that?

A I believe—I believe one is September 27th and I believe the other one was September 23rd. Now that's—

Q Did you or any of the other individuals who were with you at the Embassy Suites apply in response to either of those

[51] We had talked on the phone about perhaps having me ask some of the questions that I would ask these people as part of my case at this time.

JUDGE HARMATZ: Right.

MR. PEASE: And I wonder if I could do that? I just have a few questions.

JUDGE HARMATZ: Will I let you do that. The whole business about the union—

MR. PEASE: I wanted to ask him a few questions about his work experience, about the extent to whether it was a bona fide application.

JUDGE HARMATZ: Okay, you may ask him that. Why don't we go through.

MR. PEASE: Okay, fine.

JUDGE HARMATZ: Maybe it would be better.

MR. PEASE: Then she can ask.

JUDGE HARMATZ: Right.

CONTINUED CROSS-EXAMINATION

BY MR. PEASE:

Q What experience have you had with industrial electrical construction work?

A Hydroelectric power plants, nuclear power plants, oil wells, dust proof, explosion proof work, grain mill type work. I would say two and a half, three years up on the taconite plants in northern Minnesota.

[52] Q What about work with rigid conduit?

A A lot of work with rigid conduit.

Q What size?

A All the way up to four inch.

Q Okay. Where?

A I would—like I said before, the project, Cream of Wheat, I was job steward at Cream of Wheat in 1982. That whole project was rigid conduit dust proof enclosures. We were installing a new line, several new lines for that project.

Q Did the steward work with the tools?

A Yeah, I was the steward. I worked with the tools.

Q But you did work with the tools?

A Oh, yeah.

Q What was your responsibility working with the tools?

A Install anything that needed to be installed.

Q Did you work in a lead capacity or anything?

A No. No, I was just a steward on the project.

JUDGE HARMATZ: Excuse me. I don't think that I was talking about this kind.

MR. PEASE: Okay.

JUDGE HARMATZ: I thought that I was talking about the—I keep forgetting the name of that case.

MS. BRAMMER: *Zachry*.

MR. PEASE: *Zachry*?

[53] JUDGE HARMATZ: The *Zachry* issue. That's what I was talking about. This is totally inappropriate at this point in time. Until we get an idea of why employment was denied to these people, this kind of examination is inappropriate. I was talking about *H.B. Zachry*.

REDIRECT EXAMINATION

BY MS. BRAMMER:

Q After Mr. Buelow comments to you on September 7th that your application would be on file for future job opportunities, were you ever contacted by him about any other job opportunities?

A No.

Q Or anyone else from Ameristaff or Town & Country?

A No. I asked the question, when, you know, when and where, and they said, "Well, they don't know. We'll just keep them on file."

Q You responded to some questions regarding the union's policies about organizing activity by electricians who are members of Local 292. Would these electricians working on nonunion jobs be licensed electricians?

A Yes.

Q Would they meet the state licensing requirements for competence on these jobs?

A Yes.

Q And would they perform job duties on these jobs during their work time?

A Yes.

BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION EIGHTEEN

In the Matter of:

Case No. 18-CA-11035

TOWN & COUNTRY ELECTRIC, INC., AND
AMERISTAFF PERSONNEL CONTRACTORS, LTD., RESPONDENT,

and

CHARLES EVANS, AN INDIVIDUAL, CHARGING PARTY.

Case No. 18-CA-11044

TOWN & COUNTRY ELECTRIC, INC., AND
AMERISTAFF PERSONNEL CONTRACTORS, LTD., RESPONDENT,

and

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS,
LOCAL 292, AFL-CIO, CHARGING PARTY.

Case No. 18-CA-11080

TOWN & COUNTRY ELECTRIC, INC., AND
AMERISTAFF PERSONNEL CONTRACTORS, LTD., RESPONDENT,

and

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS,
LOCAL 343, AFL-CIO, CHARGING PARTY.

Tuesday, December 12, 1989

[65] Room 471
Federal Building
110 South 4th Street
Minneapolis, Minnesota

The above-entitled matter came duly on for hearing pursuant to notice, at 9:25 p.m.

BEFORE: THE HONORABLE JOEL A. HARMATZ
Administrative Law Judge

APPEARANCES:

*On behalf of the General Counsel
National Labor Relations Board:*

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Madison, Wisconsin 53701-1664

On behalf of the Charging Party:

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[72] (The document referred to, having been previously marked for identification as Respondent's Exhibit No. 1(a) and 1(b), was received into evidence.)

JUDGE HARMATZ: Okay.

MR. PEASE: Yes, Your Honor. We have some exhibits here with respect to which the parties agree with respect to authenticity. I understand that Mr. Gordon has an objection on materiality.

JUDGE HARMATZ: Okay. You marked them as Respondent's Exhibits?

MR. PEASE: I haven't. If you wish me to, I will, yes.

JUDGE HARMATZ: Respondent's 4 is next, I believe.

MR. PEASE: Respondent's 4 would be the—I understand to be the current constitution of the International Brotherhood of Electrical Workers, the international union with which the locals herein are affiliated.

JUDGE HARMATZ: Okay. Let's make that 4(a).

(The document referred to was marked for identification as Respondent's Exhibit No. 4(a).)

JUDGE HARMATZ: 4(b).

MR. PEASE: 4(b) would be the bylaws of Local Union No. [73] 292, one of the Charging Parties in this proceeding.

(The document referred to was marked for identification as Respondent's Exhibit No. 4(b).)

MR. PEASE: 4(c) is a salting resolution which we do not currently have a copy of here in the hearing room, but which Local 292 will be providing to us.

(The document referred to was marked for identification as Respondent's Exhibit No. 4(c).)

JUDGE HARMATZ: What is a salting resolution?

MR. PEASE: We have one from the other local if you wish to read it.

JUDGE HARMATZ: Can you give me a brief description of what a salting resolution is?

MR. GORDON: Yes, Your Honor. Basically it authorizes the local union to permit union members to go to work for nonunion contractors without being subjected to any of the strictures contained in the constitution and bylaws.

JUDGE HARMATZ: Okay. All right, thank you.

All right. We can act as if we've got it. The salting resolution of this one will be what, which one? This is a document generated by the International?

MR. GORDON: The resolutions themselves are adopted by the local union and I—

[74] JUDGE HARMATZ: Okay.

MR. GORDON: —believe those individual local union resolutions are permitted or authorized by the International.

JUDGE HARMATZ: Okay. So this one would be, 4(c) would be what, which local?

MR. PEASE: 292.

JUDGE HARMATZ: Okay.

MR. PEASE: And then 4(d) would be the local bylaws for Local 343.

(The document referred to was marked for identification as Respondent's Exhibit No. 4(d).)

MR. PEASE: And 4(e) is the salting resolution of Local 343.

(The document referred to was marked for identification as Respondent's Exhibit No. 4(e).)

JUDGE HARMATZ: All right. See now, I made a mistake.

MR. PEASE: Should we renumber them?

JUDGE HARMATZ: No.

Off the record.

(Discussion held off the record.)

JUDGE HARMATZ: On the record.

Respondent objects—stipulates to authenticity of the documents in question.

[75] MR. PEASE: Your Honor, I believe it is Charging Party.

JUDGE HARMATZ: I'm sorry. The Charging Party, I'm sorry.

The Charging Party objects to Respondent's 4(a) through (e) on the basis of relevance, but concedes as to authenticity. The objection is overruled. Respondent's 4(a) through (e) inclusive is received.

(The documents referred to, having been previously was marked for identification as Respondent's Exhibit Nos. 4(a) through 4(e), were received into evidence.)

MR. PEASE: It is my understanding that these were the documents that were in effect during the time material to this proceeding.

JUDGE HARMATZ: I assumed that, right.

MR. PEASE: Is that correct, counsel?

MR. GORDON: I believe it is, yes.

MR. PEASE: Thank you.

JUDGE HARMATZ: Okay. You may continue.

MR. PEASE: I believe that counsel for the union has a proposed stipulation on two other items that were included in our subpoena.

JUDGE HARMATZ: Okay. Mr. Gordon?

[76] MR. GORDON: Thank you, Your Honor. With respect to telephone conversations, first as between Local 292 and Local 343, there was one telephone conversation on September 7th with respect to applications or going to the Embassy Suites to file applications. That conversation was between Mr. Priem, P-R-I-E-M, and Mr. Slipy, S-L-I-P-Y.

MR. PEASE: If I may, as Mr. Gordon gave it to me during the off the record period, Mr. Priem called Mr. Slipy about a Local 343 member who was in the Local 292

hiring hall when the folks there were going to Embassy Suites—

MS. BRAMMER: Your Honor, may I object to the content of the conversation being in the stipulation unless that was within the intent of the parties, obviously, to the stipulation.

MR. PEASE: That is what I understood.

MR. GORDON: No, it is not my intent to stipulate to the content of the conversations. The documents as produced would only show date of call and from where made and to whom made.

JUDGE HARMATZ: Right.

MR. GORDON: So that is what I would like to put in by way of stipulation. Certainly if Mr. Slipy is here, he has been subpoenaed by Town & Country, if they want to ask him about that conversation, they certainly can.

JUDGE HARMATZ: All right. I agree.

MR. GORDON: With respect to conversations as between [77] either Local 343 and Local 292 and Mr. Hansen, there are no conversations as between Local 343 and Mr. Hansen with respect to either Town & Country or Ameristaff. With respect to Local 292 and Mr. Hansen, there is one phone conversation on September 7th as between Mr. Hansen and the Local 292 hiring hall office. After September 7th there are approximately three telephone conversations between Mr. Hansen and Mr. Priem. We only have a date certain for one of those conversations which would be September 12th, 1989.

JUDGE HARMATZ: Okay. Anything further?

MR. GORDON: Do you want me to go to the discipline information?

JUDGE HARMATZ: Well, I accept those stipulations.

MR. PEASE: Thank you.

JUDGE HARMATZ: Go ahead.

MR. GORDON: With respect to the request on discipline, we have—I think we can respond fully with respect to IBEW Local 343 and partially with respect to Local 292. With respect to Local 343 since January 1, 1986, which is the date used in at least some of the subpoenas by Town & Country, there have been—there are four instances that arguably are covered by the subpoena. In two of the instances—two of the instances involved union members who started nonunion companies, union members who started nonunion companies while they were union members. In one case the individual was [78] charged.

JUDGE HARMATZ: I think that—you don't have to go into detail beyond—as to those two.

MR. GORDON: Your Honor, I think it is important that in one of the cases, the charge was withdrawn.

JUDGE HARMATZ: Yes.

MR. GORDON: And in the other case the individual was found guilty as charged.

MR. PEASE: And fined \$10,000.

MR. GORDON: And fined \$10,000, none of which has been collected.

JUDGE HARMATZ: Okay.

MR. GORDON: The third instance involves an individual who was working for a nonunion contractor and joined the union. Within two weeks he resigned his membership in the union and returned to work for the nonunion contractor. Charges were filed and dropped.

The fourth instance, an individual working for a union contractor who engaged in moonlighting on his own. Charges were filed. The individual was found guilty and paid a \$1,000 fine.

Now strictly speaking, Your Honor, I don't think any of those are covered by the subpoena, but I say arguably.

JUDGE HARMATZ: I'm not interested really—you don't have to go into depth. As a matter of fact, I'm not even that [79] concerned about the information at this juncture because it would seem that it simply telescopes the salting provisions. The mere fact that the salting provisions were necessary indicates that it is a viable restriction and that is all that we are concerned about.

MR. GORDON: I have three instances with respect to Local 292 that Mr. Priem has knowledge of, but with respect to other—

JUDGE HARMATZ: Well, to make Mr. Pease happy, let's hear them.

MR. GORDON: I think Your Honor understands that as far as Charging Party is concerned, this is all irrelevant.

JUDGE HARMATZ: I agree with you. To carry this forward to this—in this depth, I think you are right, but we'll keep everybody happy.

MR. GORDON: Okay. First with respect to Local 292 and Mr. Priem, an individual who opened a nonunion shop resigned his membership. Charges were filed and subsequently withdrawn. The second individual sold his union shop to a nonunion entity resulting in the layoff of two union members, fined \$2,400 which was paid. The third individual charged with attempting to work for a nonunion contractor without clearance from the union, fined \$500. We don't know whether that has been paid or whether it's been appealed.

JUDGE HARMATZ: Okay. I'll receive that as a concession.

[80] MR. GORDON: I am informed that the fine was suspended.

JUDGE HARMATZ: Okay. I'll receive that as a concession.

MR. GORDON: Is it necessary, Your Honor, for us to inquire further as to other instances of discipline on behalf of—

JUDGE HARMATZ: I don't think it is necessary.

MR. GORDON: Okay. With respect to—do you want me to continue with respect to a proposed stipulation on the jurisdictions of Locals 292 and 343, or do you want to stay with the subpoena?

JUDGE HARMATZ: Yes, I just want—all I want from you is a statement that they have separate headquarters and separate geographic jurisdiction although their craft jurisdiction is the same. Do you agree with that statement?

MR. GORDON: I'd like to—yes, and I'd like to add just a little bit to it.

JUDGE HARMATZ: Okay. Go ahead.

MR. GORDON: That is that the geographic jurisdiction of Local 292 consists of five counties including and surrounding the Minneapolis Metropolitan Area. The geographic jurisdiction of Local 343 consists of thirty-nine counties in southern and western Minnesota. Neither Local 292 nor 343 has jurisdiction over International Falls, Minnesota. That jurisdiction goes with Local 294 which is headquartered in Hibbing, H-I-B-B-I-N-G, Minnesota.

[81] With respect to the craft or the work covered, both 292 and 343 have jurisdiction over inside work such as that involved in this case. Local 292 has additional work jurisdiction as well, but I do not believe that that is relevant to this proceeding.

JUDGE HARMATZ: Okay. And as you indicated off the record, these are three of seven locals with this type of craft jurisdiction that operate in the state.

MR. GORDON: Correct, Your Honor.

JUDGE HARMATZ: Okay.

MR. PEASE: We join in that stipulation.

JUDGE HARMATZ: So be it. The stipulation is received.

Okay. Any further preliminaries before we allow Ms. Brammer to proceed?

MR. GORDON: Not from Charging Party.

JUDGE HARMATZ: Okay. You may call your witness.

MS. BRAMMER: I would like Craig Jones to the stand and all other witnesses outside, please, and Mr. Larson, if you could stay outside the door in that chair? Whereupon,

CRAIG JONES

having been first duly sworn, was called as a witness herein and was examined and testified as follows:

[82]

DIRECT EXAMINATION

BY MS. BRAMMER:

Q Who are you now employed by?

A Commonwealth Electric of Minnesota.

Q What is your job with them?

A Inside wireman.

Q You are a licensed electrician?

A Yes.

Q What class?

A Class A.

Q Were you employed on September 7th, 1989?

A No.

Q Are you a member of a union?

A Yes, IBEW Local 292.

Q Did you go to Embassy Suites Hotel on September 7th?

A Yes.

Q For what purpose?

A To apply for a job.

Q How did you find out that applications were being entertained there?

A Through the agent I heard that they were taking applications.

Q Were you interested in possibly obtaining a job?

A Yeah, because I'd have had to wait for—through the waiting week. I had just come from the unemployment office. [83] I had just sent in the bills for Montesorri and Latchkey for my kids, which is more than my house payment, and it was getting to the fall and I was worried about working through the winter.

Q Would you describe—first of all, approximately what time did you arrive at Embassy Suites?

A I went to the unemployment office about 8:30 so I'd say it was about an hour later. Maybe 9:30, something like that.

Q And what happened when you arrived there?

A There was some people in a room filling out applications. I was given an application and I filled it out.

Q Do you recall who gave you the application?

A Yes, the gentleman in the corner, I believe.

MS. BRAMMER: And let the record reflect that he is pointing to Mr. Steven Buelow.

JUDGE HARMATZ: So be it.

BY MS. BRAMMER:

Q Do you recall at the time the application was given to you whether Mr. Buelow said anything to you at that time?

A Nothing in particular other than "pick me up some pop".

Q Did you get an interview that day?

A Yes.

Q Prior to your interview, did anyone address you, either personally or as part of the group of applicants there, regarding the application process for the job?

[84] A No. If I am following you, no.

Q Who interviewed you when you got an interview?

A Mr. Sager and another guy with dark hair. I don't recall his name.

Q Did he identify where he was from?

A Yes, they said they were from Town & Country Electric out of Wisconsin.

Q During the interview, in as much detail as you can remember, what was said?

A They informed me they were a merit shop, which I didn't realize until that time, and they talked about the merits of a merit shop.

Q And "they" being who?

A Mr. Sager and the other gentleman.

Q Was Mr. Buelow speaking during the interview?

A He didn't speak during the interview. I believe he was in the room and out of the room, back and forth, I think.

Q I'm sorry. I interrupted you.

A They spoke of the virtues of a merit shop, working for a merit shop, and I spoke of the virtues of being in a union shop and having been trained by them, and so forth. We talked about—they listed the virtues of their shop. They told me that they start their employees out at \$13 an hour. They talked about having work north of the cities and some work coming up locally. I asked if the work they had north of the [85] cities was Boise Cascade, and they said "no".

We talked about—I think I suggested or asked, have they ever thought of being a union or being involved or

hiring through the union, and they had said that they would not be signatory to any union and that basically their customers preferred it that way. They talked about \$13 an hour is what they start their people out at. They mentioned, I think, some subsistence pay, and I think I talked about I have to talk with my wife, you know, if I was to consider a job outside of town, and they told me again that they would have some work in town.

Q Did you receive a job offer at that time?

A No.

Q What, if anything, were you told about what would be done with your application?

A That it would be kept on file and that—I think they asked me if I'd consider working for them locally, work close in town here, and I said, "Yeah, I'd consider it". And I think that's basically where it was left.

Q Did you ever receive any further telephone calls or letters from either Town & Country or Ameristaff?

A No.

MS. BRAMMER: Nothing further.

MR. GORDON: Your Honor, there will only be one line of questioning and that is whether he was told about any [86] differential to be paid by the union or not, and I don't know if I need to go into that in light of our earlier discussion.

JUDGE HARMATZ: No, no. I'm not going to permit examinations in that area beyond what the union policy was.

MR. GORDON: Then I have no questions.

JUDGE HARMATZ: Is that it?

MR. PEASE: Just a couple questions.

JUDGE HARMATZ: We got that answered anyway, Mr. Gordon.

MR. GORDON: Pardon me?

JUDGE HARMATZ: We've got that answer anyway. I think it is on the record, but I'm not sure.

MR. GORDON: Well, I know we discussed it in one of our earlier conversations. I'm not sure if it was on or off the record.

JUDGE HARMATZ: But in any event, it doesn't make any difference.

CROSS-EXAMINATION

BY MR. PEASE:

Q Craig, what time did you arrive at the Embassy Suites?

A I'm guessing maybe 9:30, quarter to 10.

Q But you are not sure?

A No. I had gone to the unemployment office first that morning so, no, I can't be sure. I can be sure that I had to leave like about 11, 11:30 to pick up my daughter because it was her first day of kindergarten, and I was about to leave [87] when I went in to see what was going on because I was going to tell them I had to leave, and they said, "We'll interview you now".

Q Okay. That's what I wanted to bring out, that you had apparently indicated you had a problem in getting your daughter and you asked to be interviewed, and then they did bring you in to interview you?

A I went in and said, "I have to go". They said, "Well, we are getting ready to interview you people. We'll take you first."

Q Okay. Isn't it true that when you asked about the project that you referred to the BE&K construction project in International Falls?

A Yes.

Q Isn't it also true that you asked them what you would be paid and they said, "\$15 an hour"?

A No. They told me they start the employees at \$13 an hour.

Q Didn't you say that you would be insulted at working at that rate?

A They said — the exact wording was, "I don't mean to insult you. We start our employees out at \$13 an hour." And I said, "That is an insult".

Q Well, isn't it true then that they said that apparently you are not willing to work for the rate that we are offering?

[88] A No, that was never said.

Q Are you sure?

A That was never said.

(Pause.)

MR. PEASE: Okay. I have no further questions of this witness at this time.

JUDGE HARMATZ: Anything further?

MS. BRAMMER: Just one.

REDIRECT EXAMINATION

BY MS. BRAMMER:

Q Did you have an appointment for an interview that day?

A No, I didn't.

MS. BRAMMER: Nothing else.

THE WITNESS: Am I free from all of this? Am I done? (Whereupon, the witness was excused from the stand.)

JUDGE HARMATZ: Off the record.
(Discussion held off the record.)

JUDGE HARMATZ: On the record.

Ms. Brammer?

MS. BRAMMER: Mr. Don Larson.
Whereupon,

DON LARSON

having been first duly sworn, was called as a witness herein and was examined and testified as follows:

[89] DIRECT EXAMINATION

BY MS. BRAMMER:

Q Spell your last name for the record, please.

A L-A-R-S-O-N.

Q And are you now employed?

A Yes, I am.

Q By whom?

A Muska Electric.

Q And your position there is what?

A Journeyman wireman.

Q Are you licensed by the state?

A Yes, I am.

Q How long have you been a licensed electrician?

A Since 1960.

Q Are you a member of a union?

A Local 292.

Q Were you employed on September 7th, 1989?

A No, I wasn't.

Q And did you go to Embassy Suites?

A Yes, I did.

Q How did you find out — well, first of all, what was the purpose that you went there?

A To secure a job.

Q And how did you find out that might be a possibility there?

[90] A They had an ad in the paper the previous Sunday, and then a network of people that I know were saying that they were going to go out there.

Q And that network of people would be —

A People I worked with, right.

Q When did you arrive at the Embassy Suites?

A About 9:15.

Q And would you describe in as much detail as you can recall from the time you arrived there what happened?

A We checked at the desk to see where the people were that were to interview us and —

Q "We" being who?

A Well, there was about five of us around. Mike Priem was there, Shafranski, Mick, myself.

Q "Mick", is that Malcolm Hansen?

A Malcolm, yes.

Q Okay.

A And they hadn't arrived. They had been delayed due to fog in Wisconsin. So we sat and it was probably quarter to 11, 11 o'clock, they came in, very apologetic, saying they were fogged in, and that they had two suites of rooms, that we should follow them up.

Q Now did the people who arrived identify themselves?

A Yes, they did.

Q And who were they?

[98] JUDGE HARMATZ: Off the record.

(Discussion held off the record.)

JUDGE HARMATZ: On the record.

MS. BRAMMER: Malcolm Hansen, please.
Whereupon,

MALCOLM HANSEN

having been first duly sworn, was called as a witness herein and was examined and testified as follows:

DIRECT EXAMINATION

MS. BRAMMER:

Q Would you state your last name for the record, please?

A Hansen, H-A-N-S-E-N.

Q Sometimes you go by Mick or Mickey?

A Yes, I do.

Q Are you now employed?

A Yes, I am.

Q By whom?

A Muska Electric.

Q As a licensed electrician?

A Yes, I am.

Q Have you ever been employed on the Boise Cascade job site in International Falls?

A Yes, I have.

Q When was that?

A I believe that I worked on the Boise Cascade job per se [99] on September 12th, 13th and 14th.

Q How long have you been a licensed electrician?

A I believe I got my license in 1971 or 2.

Q Are you a member of IBEW?

A Yes, I am. I've been a member for 28 years.

Q Which local?

A At the present time I belong to 292 in Minneapolis.

Q Did you have an interview before you were hired for the Boise Cascade job?

A Yes, I did.

Q When was that interview?

A I believe if I'm correct the interview was September 7th, 1989.

Q Was that at the Embassy Suites?

A Yes, it was.

Q How did you obtain that interview?

A I obtained that interview by calling Ameristaff in I believe it was Green Bay, Wisconsin.

Q How did you get their number?

A I got their number — I had read their ad in the paper on the Sunday previous to that. Also that morning I had called the union hall and Lilah had referred me out to —

that Mike and Greg were out at the Embassy Suites.

Q And "Lilah" is who?

A Girl that works in the office at 292.

[100] Q Referring you back to your call to Ameristaff, who did you talk to there?

A I talked to a girl there. I believe her name was Lorie.

Q And would you describe what she said and what you said during that conversation?

A Well, she answered the phone of Ameristaff and I told her I was responding to an ad that was in the Sunday paper the Sunday previous to that, and I said, "What kind of work do you have?" She said, "Well, we have both union and a nonunion job", and I said, "Well, where are they at?" She said, "Well, the nonunion job is up at International Falls". She said "northern Minnesota", and I said, "International Falls?", and she said "Yes."

And I asked her about where is the union work at. She said, "Well, we can't disclose that at this time."

Q Do you recall anything else she said?

A I asked her how I could get an appointment there, and she replied that I could get an appointment. She said the people had left already, that there was the president of their company, Steve Buelow, Mr. Sager, and someone else, she said, flying over there. Evidently they were being fogged in, but she had the authorization to make an appointment for anybody that called in because they wanted as many applicants as possible.

Q Did you make an appointment?

[101] A Yes, I did.

Q And what time was that for?

A Eleven o'clock.

Q Anything else in that conversation?

JUDGE HARMATZ: We're talking about 11 o'clock where?

THE WITNESS: At the Embassy Suites.

JUDGE HARMATZ: And that would be what date?

THE WITNESS: On the 7th of September.

JUDGE HARMATZ: Okay. Continue.

BY MS. BRAMMER:

Q Did you go to the Embassy Suites at that time on that day?

A Yes, I did.

Q What happened when you arrived there?

A When I arrived there I recognized Mike Priem, Greg Shafranski, Don Larson, a number of other people from the local. I can't remember exactly who they were. Some of them I didn't know their name at the time, but I had seen them on different jobs and union meetings and so on and so forth, and we were told that some people from Wisconsin were not there yet. They were fogged in. So we sat down and visited.

Q And the people did eventually come in, is that correct?

A I would say approximately an hour later the people arrived.

A And did you hear them introduce themselves?

[102] A Yes, I heard Steve Buelow introduce himself from Ameristaff, and I heard Ron Sager introduce himself from Town & Country. The other person was Denny Def-ferding, but I didn't hear his name at that time.

Q What did you do when they arrived?

A Well, we just stood up and met them and, you know, they seemed quite happy to see all of us there. We had a little small talk and then he said, "Well, come on upstairs, fellows. We got refreshments up there and we've got to go on with this here. We're glad to see all of you", and so on and so forth.

Q And did you go upstairs then?

A Yes, we went upstairs. Had some small talk in the elevator. Went on up the stairs to I believe—it was a corner room. I don't know if it was 904 or 905.

Q What happened when you got there?

A We got there and I believe Steve Buelow from Ameristaff, he passed out some applications, and Ron Sager from—come in. He introduced himself again as Ron Sager from Town & Country. He wanted to tell us about Town & Country Electric, how they was a leader in the field in electrical industry, and described their 401(K) plan, their workman's compensation, disability income, their zero deductible hospitalization, paid vacation. Basically the merits of working for Town & Country Electric.

Q How much time would you estimate that he spent talking [103] about the benefits of Town & Country?

A I guess I would estimate from ten to fifteen minutes. Maybe not that long. I don't know.

Q And then what happened?

A Then they left and we were finished filling out our applications. Steve Buelow come back and picked up our applications and left.

Q With the applications?

A Yes.

Q And then what happened?

A Then Steve Buelow come back and—

Q How long was he gone during that period?

A I suppose ten or fifteen minutes. Then Steve come back and said, "Are you men only interested in union work?" And I responded I was just interested in all work.

Q Did anyone else respond?

A Mike Priem responded, "We are all licensed journeyman electricians here. We are interested in any kind of work you have."

Q At that time what did Mr. Buelow say or do?

A I think then Mr. Buelow left.

Q And then what happened?

A Well, then a few minutes later Mr. Buelow come back with Ron Sager, and Mr. Sager at that time asked us—well, actually let me backtrack a little bit. Steve come back and [104] he called out a bunch of people's names. He called out Gary Weseman and Dave Rasmeth and Kirk Wilson, and I can't remember the other people's names he called for. Pat Stack. And they were none of them there.

Q Was Gary Weseman not there?

A I think Gary Weseman was there and they took him in there for an interview.

Q Then what happened?

A Then he come back again and this time Ron Sager was there with him, and Ron said, "We are only going to give people interviews that have appointments". He said, "If you don't have appointments, the rest of you leave. Just leave. We're going to close the doors. We've got a plane to catch. We've got to get back to Wisconsin. We don't have any time."

Q At that point had Craig Jones already been interviewed, if you know?

A I do not know that Craig Jones was interviewed.

Q And then what happened?

A Well, then Red Larson said, "Well, we are here to take the place of those people that didn't show up." Mike Priem, I think, said, "Well, we are here for any job that you have." And I guess at that time I said, "Well, I'm here for an appointment. I'm going to have an interview. I don't care if I have to stay here until midnight."

Q Did you—

[105] A "If I have to, I'll call Skip Humphrey".

Q Who is that?

A He is Attorney General of the State of Minnesota.

Q Did you get a response to that?

A Ron Sager at that time said, "I don't care who the hell you call." He said, "If you don't get out of here, I'll call the police."

Q What happened then?

A Then they left the room. Well, I guess I responded, "I have an appointment. I made an appointment with Lorie over in Wisconsin this morning and I'm going to get an interview."

Q Did you get one?

A Yeah. They left and about fifteen minutes later they come back and they granted me an interview.

Q Prior to your interview, was anything said by either Mr. Buelow or Mr. Sager about what would be done with your applications?

A Prior to my interview Mr. Buelow said that the contractor that we are working with now is for nonunion jobs. There will be union work coming later. We will keep your applications on file for a later date. At that time Mike Priem said, "Yeah, I know what file they are going to go into."

Q Did either Mr. Buelow or Mr. Sager say anything regarding a customer for this job?

A During the interview?

[106] Q Yes. Or when all of you were in the room. Either one.

A Yeah, I believe that Mr. Sager said that the customer was for a contractor for Boise Cascade.

Q Okay. And who was present for your interview?

A Present for my interview was Mr. Sager and I think it is Denny Defferding. Steve Buelow was in the suite, but he was in the—the Embassy Suites have two or three rooms to the suite and he was in a back room.

Q Would you describe what was said during that interview, both by Mr. Sager or Mr. Defferding and yourself?

A Well, they called me in there and they said, "Well, we know that you are a union member." I said, "Yes, I've been a union member for 28 years." And then we talked about the job up there and what it consisted of, and Mr. Sager asked me, he said, "Well, you go through your last work experience for the last ten or fifteen years." I said, "Well, I'll tell you since 1956." And so I went through basically my work experience since 1956.

Then Mr. Sager said, "Well, you know, our customer up there is for Boise Cascade." He said, "We can't have any signatory employees up there." He said, "Our customer, Boise Cascade, will not allow it." I think then Denny Defferding went into that he was once a union member and that any people they hire, once they hire them, they expect them to drop their union membership, and Denny Defferding asked me if I would be

[118] a day per diem?" I said, "That sounds fair to me." Then he said, "Okay, we'll do that."

I replied, "You know, Ron, I'm up here. I'll work with you." He said, "That sounds great", and I went back to work.

Q Did you ever talk —

JUDGE HARMATZ: Wait a minute. Let's back up a minute.

Was it your understanding that Smithback was not licensed?

THE WITNESS: Yes, it was.

JUDGE HARMATZ: I see. So what you were saying in connection with Johnsen's request that two leave the job, Smithback indicated that only one would leave because he would no longer work with tools?

THE WITNESS: He would no longer do any work.

JUDGE HARMATZ: All right. So Smithback himself would be, because he was unlicensed, would be covered by the state restriction that you could work two with one?

THE WITNESS: Yes, he would.

JUDGE HARMATZ: Okay.

BY MS. BRAMMER:

Q Did you ever talk with any other employees of Town & Country about the fact that you had received a raise that day?

A Yes, at coffee—Bob Steiner was very interested in me. He knew I was union. Evidently talked about me on the Friday before over in Wisconsin. He would wonder why I was doing up [119] there and so on and so forth, and I talked a lot about the union. At coffee that day—

Q Was this on September 12th?

A Yes, it was.

Q Okay.

A At coffee that day Tom Steiner said, "How much money do you make?" I said, "I make more than Smithback. I just got a raise." And he said, "Well, what do you make at home?" I said, "Well, I make \$25.70 an hour at home." He asked me, "Well, what are you doing here then?" I said, "Well, I can't tell you right now, but I'll tell you before I go."

Q Was Smithback in the area at that time?

A Yes, he was.

Q Did he say anything during that conversation?

A I can't recall him saying anything, but he was very angry at the fact that—when I told Steiner I was making more money than Smithback, he wasn't not happy with that at all.

Q Do you recall what he said?

A Well, at that time I think he said, "Well, I don't want you talking about unions. I don't want you talking about unions on the job, at the cabin or anything. I don't

want Steiner and Reinders to hear it. I just don't want to hear it. That's it."

Q What did you say to that, if anything?

A I told him I wasn't going to stop.

[120] Q Anything else that you recall from that break? (Pause.)

A I think at that break we talked about—Rod Smithback talked with me that he'd take me that night to get safety shoes. I think we talked about that.

Q Was that a requirement there on the job?

A Yes, it was.

Q Directing you to the next day, September 13th, when you were on the job, did you observe anyone else from the State Board of Electricity on the job?

A Yes, about noon I believe a man named Gosland, he is an area inspector up there, come on the job and he come right up to me and asked me who I worked for.

Q What did you say?

A I said, "Well, I'm not positive who I work for. I filled out an application with Ameristaff, but I'm working with the guys here from Town & Country and I use Town & Country's tools and Town & Country employees are supervising working off of my license." Rod Smithback at that time said, "No, he works for us."

Q Did he indicate at that time, Mr. Smithback, who "us" was?

A Town & Country Electric.

Q Did you discuss the union with anyone at the job site that day, September 13th?

[121] A Oh, yeah, I discussed the union with people at the job every day. Talked about the benefits and so on and so forth, and right after the state inspector left, it was some time after that, we had coffee about 2:30 and I said to Tom Steiner, "You do know why I'm up here, don't you?"

Q Who else was in the area at that time?

A Smithback and Randy Reinders. "Well," Steiner said, "We think we know you're up here. Why are you up here?" I said. "Well, I'm up here trying to organize for the International Brotherhood of Electrical Workers." At that time Smithback jumped to his feet and said, "Jesus Christ, I don't need that. I don't want you talking about unions anymore. I got to go call the office and talk to Ron Sager." We went back to work.

Q Did you observe Sager leave the area after he said that?

A That was Smithback.

Q Smithback, I'm sorry.

A Yes, I did.

Q Did you see him on the phone?

A Yes, I seen him go into the office where there was a phone.

Q At the time that you said that during that—was that an afternoon break?

A Yes, it was.

Q During that break, were you a paid union organizer?

A I've never been a paid union organizer.

[122] Q At any time had you been compensated for any difference in wages between what your wages were at that job site and what your wages would have been on union scale under the 292 contract?

A After I got back I was compensated. I was made whole for the time I spent up there. After Sager was—not Sager, Smithback, I get these two people mixed up—Smithback, after he made the phone call, he come back—

MR. PEASE: Object. Beyond the scope.

JUDGE HARMATZ: Of what?

MR. PEASE: Talking about something that doesn't have anything to do with the question before him.

JUDGE HARMATZ: Well, I don't permit that kind of objection from a nonexamining counsel. If the examining counsel is satisfied with the response or the lack thereof, I leave that up to—unless it is totally irrelevant, at which point I jump in.

You may continue. What were you going to say about what Mr. Smithback said?

THE WITNESS: At 3:55 p.m. and he come back and he said, "I just talked to Ron Sager over in Appleton, and I don't want you talking about the union. Ron Sager doesn't want you talking about the union. Boise Cascade doesn't want you talking about the union, and if you don't quit talking about the union, I'm going to fire you." My response was, "That [123] could be, but I'm not going to stop talking about the union."

BY MS. BRAMMER:

Q Was anyone around when that was said other than you and Mr. Smithback?

A Tom Steiner was around. Reinders was around. Everett Hall was around. Dennis Moran was around.

Q Who are Hall and Moran?

A Hall and Moran were two people, employees for Boise Cascade, that basically it was my understanding we were doing the job for. Then—

Q How did—go ahead.

A Smithback at that time had me call Ron Sager. So I called Ron Sager at a number.

Q Was that during your work time that you were directed to do that?

A Yes, it was.

Q And did you reach Mr. Sager?

A Yes, I did.

Q And what was said during that conversation?

A He said, "I don't want you talking about the union." He said, "Boise Cascade won't allow us to talk about the union. I don't want you talking about it. I don't want you talking about anything but the job. I don't want you talking about church. I don't want you talking about gambling. I don't want you talking about anything but work. Now go get [124] Smithback and tell him to call me."

Q Did you do that?

A Yes.

Q How did you get back to the cabin where you were housed that day after work?

A We rode in Mike Grow's van. Rod Smithback was driving it and I and I believe Tom Steiner was in it. Either Tom Steiner or Randy Reinders. I'm not positive which one was there.

Q Okay. Was there any talk about the union on the ride home that evening?

A I don't know that there was really much talk about the union, but out of the air Rod Smithback says, "Well, I've got to give you credit, Mickey, you sure as hell do what you do really well." He says, "Just how much would it take you to jump ship and come over to our side?" My response was, "What do you mean, jump ship?" "Get up off your union activity and come to work for us." I said—at that time I just grinned and said, "I don't think you have enough money."

Q How about once you were at the cabin that night, anything come up about the union?

A Once we were at the cabin that night we got talking about the union a little bit, and Smithback again said, "I don't want you talking about the union here or on the job or in the cabin, or whatever." He said, "I'm just tired of this. I don't want my people hearing it. Right now I've got

to go out [125] to the airport and get Mike Grow's papers from the state so that he can go to work tomorrow."

Q When you say "we" were talking about the union at the cabin, who do you mean?

A Myself and Tom Steiner and Reinders.

Q Were you all housed in the same cabin there?

A Yes, we were.

Q And Smithback?

A Yes, he was.

Q On the next day, September 14th, how did you get to work that day? To the job site?

A Well, that morning when I work up it was pretty tense around there, and I decided I was going to drive my own car to International Falls that day. So I drove my car to International Falls. I told Smithback I had some business to take care of before work, would he pick me up at the Country Kitchen. He did pick me up at the Country Kitchen.

Q That is a restaurant?

A Yes, it is. About two or three miles from the job site.

Q And were you picked up?

A Yes, I was by Smithback in his company truck. On the way to the job site he said, "Well, Bob Stephenson is going to be up here next week. You know Bob Stephenson used to be a paratrooper in Viet Nam."

Q Did he identify who Bob Stephenson was?

[126] A No, he didn't, but from the conversation prior to that I assumed that he was one of the owners of Town & Country Electric.

Q Okay. Go ahead.

A I said, "What a coincidence. I was a paratrooper too." "The fact is," I said, "I was in the counterintelligence corps," I told him. "Well, I can believe that," he says, "because you are really good at what you do," he says. By

this time we had come up to the pickets up at the gates and outside of the gate there was two pickets, and later I found out a reporter from the *Minneapolis Star and Tribune*, Dave Hagen. I said, "Just a minute," and I jumped out of the truck and I went over there and I told those two pickets, "I just want you to understand I am not crossing your picket line, but I am up here as a union organizer and to help our cause."

Q Did you get back in the van then?

A Yes, I did. It was a pickup though.

Q Pardon me?

A It was a pickup that we was in.

Q Okay. And then when you got back in the van, was there any discussion—in the pickup, was there any discussion with Mr. Smithback about the union?

A Yeah, he said—first we drove on up and the guards come out. There was three or four guards out there and two come over to my side, opened the door and said, "I want to see your [127] badges." I thought they were going to pull me out of the truck so I handed him my badge. He said, "Go on in" so we drove on in. When we got there Smithback said, "I don't want you talking about the union or any more union activity any more." So then we went to work.

Q At any time that day, did Mr. Smithback repeat any offers regarding you switching sides?

A Yeah. He kind of wondered if I thought about the offer he had made the night before, and I said, "Well, just how much money are you talking about? I kind of thought about that a little last night." He said, "I don't know. Why don't you go call Ron Sager." So I did. I went and called Ron Sager.

Q And did you reach him?

A Yes, I did.

Q And what did you and he say during that conversation?

A I said, "Rod wants me to call you and talk to you, what it would take to get me to forget about my organizing and talking about the union and just work," and Mr. Sager's answer at that time was, "That was between Rod and you. I don't have anything to do with that. That is between you and Smithback." But he did say, "I have some reports about you I want to discuss." I said, "What's that?" Mr. Sager says, "Well, I understand you won't wear your safety shoes. One day you had your hard hat off, and there has been some talk about your production." I said, "That's bullshit." I said, "The only [128] thing Smithback is worried about is my union activity."

He said, "Well, I've got to talk to Denny Defferding and I'll call you at 7 o'clock tonight at the cabin and we've got to get this straightened out, and I want to hear both sides of the deal," and once again he said, "I told you I don't want you talking about the union. I don't want any union activity. I don't want you talking about gambling. I just want you to work. Go back and find Smithback and get to work." I said, "Yes, sir."

Q To what extent, if any, had you failed to wear your hard hat on September 12th or 13th? Or the 14th?

A On the 12th of September when we had coffee, I had coffee with Denny Moran and Everett Hall at their desk and I took my hard hat off at that time. That is the only time I had my hard hat off on this job.

Q Was that break time?

A Yes, it was.

Q And was that indoors?

A Yes, it was at Everett Hall's desk. I didn't have any coffee with me and he had a coffeepot there, and he invited me to have coffee with him.

Q When you left the office, did you or did you not put your hard hat back on?

A Yes, I did. The office was not a partitioned off office. It was just a desk and whatnot the way we were working there.

[129] Q Were there any other occasions that you did not have your hard hat on while on the job?

A No, there was not.

Q Okay. You talked a little about—did Ev Hall and Denny—was Denny Moran in their during that time?

A I think at that time he was, yes.

Q Okay. Did either of them have their hard hats on?

A No, they did not. I did have my hard hat off another time or so when we was on break, but when I was working I always had my hard hat on.

Q Okay. Were you aware of any rules regarding the wearing of hard hats on break?

A No, I was not.

Q Regarding safety shoes, to what extent, if any, effort has been made by you or anyone else to obtain safety shoes for you?

A Well, on the first night I was on the job I rode back to the cabin with Smithback and he took me to the bootery to get safety shoes and they was closed. The next morning I mentioned it to Smithback that I needed to get safety shoes. He said, "Yes, I'll come and get you at lunch and we'll go out and get you safety shoes at lunch." He didn't appear. I didn't have a car. On the 14th at noon he took me out and I bought safety shoes. After I got back—

Q From your safety shoes?

[130] A No, prior to that. After I got back from talking to Ron Sager, in the presence of Denny Moran, Everett Hall, Reinders, Steiner, and I do not know whether Grow was actually present at that time, but he was on the job.

He had gotten his permit to work until he took his state test. I said to Rod, "I understand you are not satisfied with my work." I said to Denny Moran and Everett Hall, "Are you satisfied with my work?" "Oh, we're very satisfied. We're satisfied with all you people's work." Smithback said, "Well, you don't have to worry about if they're satisfied. It's me, and I was only dissatisfied maybe on Tuesday morning." He said—

Q Prior to that time, on September 14th with your call with Ron Sager, had you ever been told by anyone from Town & Country or Boise Cascade that your work failed to meet any kind of expectations?

A No.

Q Had Mr. Sager ever been on the job that you observed?

A Not that I observed.

Q Okay. Okay, go ahead. I interrupted you.

A Also in that conversation I said, "What's this that you tell Sager that I won't wear my hard hat?" "Well, you didn't have your hard hat on the other day when you was having coffee with Moran and Hall," and Everett Hall piped up, "Hell, I seen you at lunch the same day. You didn't have your hard hat on." And I said, "About my safety shoes, I was always willing to [131] buy my safety shoes. What the hell you mean, I wouldn't wear them? I haven't got a car here. How am I supposed to get there?" So that noon is when he took me out to get my safety shoes.

Q By not having a car there, you mean a car at the job site during the day?

A No, I did not have a car at the job site during the day. They did not want us to have our own private vehicles on the job site.

Q Okay. Anything else in that discussion with Smithback about your job performance?

A No, not really other than that once again I think he said, "I don't want you talking about the union or anything else." He said, "I just want you to work."

Q Did you engage in any kind of union activity that day on the 14th?

A Oh, yes.

Q Okay. When was that?

A At noon we got talking about the union and we got talking about Town & Country's great Christmas party, and I said, "Let's call the business agent from 294," I said, "Bob Jensen," I said, "maybe we could get him to petition for an NLRB election and you'll be in by time for Christmas. They really have a good Christmas party." And Smithback jumped up, "Don't answer. Don't answer. Don't say a word. Just don't [132] say a word." He said, "I don't want you talking about the union. I don't want you talking to these guys about the union. I don't want you to hear it. I don't want you talking to it on your road, at the job, at the cabin. I just don't want you even mentioning it."

Q Did you say who was there at that time?

A Mike Grow, Tom Steiner, Randy Reinders, Smithback and myself.

Q Okay.

A At this time I said, "Well, I just thought maybe that you wanted Bob Jensen to come out here. It would be nice, and we'd have a little meeting and petition for an election."

Q Who is Bob Jensen?

A He is the business agent out of 294 in Hibbing. At that time Mike Grow said, "Yeah, we'll have a meeting all right. We'll have the meeting at the bottom of the lake. How good are you at wearing anchors?" I didn't say any more.

JUDGE HARMATZ: Who was it that said this now?

THE WITNESS: Mike Grow.

JUDGE HARMATZ: Mike Grow is the one who asked you about the bottom of the lake?

THE WITNESS: Yes, he is.

JUDGE HARMATZ: He was just a co-worker, right?

THE WITNESS: He was the guy that that day had been allowed to come back on his job because he had made [133] application to the State Board of Electricity to take his test.

JUDGE HARMATZ: I see.

BY MS. BRAMMER:

Q Now that night, did Mr. Sager call you at 7 as he had indicated?

A No. When I got thinking about what Rod said that — about my production, the more I didn't like it. So I said, "You know, Rod, there is a few things I want to talk to you about." I said, "What's this that you told Sager I wanted to quit the other day?" "Oh, no," he says, "I didn't say you wanted to quit. In fact, Ron Sager says, 'Rod, whatever you do, don't make Malcolm mad'." That isn't the term, but what it meant. "Don't make Malcolm mad because the only reason we can be on the job is because he is licensed, and if he leaves we can't be there." That's what Rod told me.

He said, "I never told him that, and I only questioned your production on Tuesday morning," and I said, "Well, Rod, if you're man," I says, "get on the phone there and you call Ron Sager and tell him about that production. That was bullshit. I was tending for Reinders and Steiner and they were actually setting the pace." So Rod got on the phone and he told Sager, he said, —

Q Did you hear Rod on the phone?

A Yes, I did. Yes, I was standing right beside him. He [134] said, "Ron, that was bullshit about Mickey's pro-

duction. Steiner and Reinders were setting the pace and he was moving the scaffold for them and handing out material." Then he handed me the phone and he said, "Sager wants to talk to you." I said, "Okay." So I got on the phone and Sager said, "I want you to call 414, or whatever number it was, collect." It happened to be Steve over in Ameristaff.

I got Steve on the phone and said—Steve told me, "Mickey," he said, "we got a little flapdo. The State Board of Electricity won't let me hire people for Minnesota to work as an electrician because we haven't got a license so I guess whatever contract I have with you has to be done." I said, "Okay," I said, "how about my pay?" He said, "Well, send out your time sheets and just give them to Rod and he'll send them in to me. What shall I do with your check?" I told him, "Just send it home." I said, "Steve, how about Town and Country then, are they going to pick up my time, am I going to be working under their payroll or what?" I don't know," he said, "you've got to call Ron Sager back."

So I called Ron Sager back. This time he wasn't near as friendly as he had been the last few times. I said, "Just what is going on here? What's my status?" I said, "Are you going to pick me up or am I working directly for you, or what's this?" And he said, "Absolutely not. You have never worked for us. You didn't get a raise. You thought you was a [135] supervisor. I never told you that." I said, "Well, what about my check?" "I don't care about your check." I said, "I'm going to stay here until I get my check." "I don't give a damn what you do. I'm getting tired of it. You don't work for us. You don't understand."

I said, "I'm not leaving here until I get my money." "I don't care what you do. If you don't get off this job, I'm going to call the guards and have you escorted off the job."

Q Did you ask Mr. Sager or discuss with him at any time during that phone call who your employer had been?

A At that time I said, "Who the hell do I work for? I work for Town & Country." "No," he said, "you work for Ameristaff." I said, "Well, I'm supervising your people. They're working on my license. I use your tools. Smith-back says I work for them. What do I know?" "Well, you don't work for us," he says. "When did I get my check?" He says, "I'll call tonight at the cabin. Now I'm going to hang up now."

Q At any time during that conversation did Mr. Sager say anything about why you were being terminated or weren't being picked up by Town & Country?

A Well, we got into a conversation about it. He never ever told me why. He didn't know.

Q Why he didn't know what?

A He never said why I was being terminated. Basically I don't even know that I'm terminated yet.

[136] Q Did he ever mention—

A I have no slip.

Q Did he ever mention low productivity as a reason why you weren't being picked up by Town & Country during that call to you?

A No.

Q Or with you?

A Low productivity was never mentioned to me.

Q Did he ever mention the hard hat or the steel toed shoes?

A He had mentioned the hard hat that morning and the steel toed shoes, but in that conversation he didn't mention it. I had on my steel toed shoes at that point in time.

Q Did you remain at the cabin—these calls were from the cabin, is that right, where you were being housed?

A No, we were at the job site at that time.

Q Oh, you were at the job site at that time. Did you remain at the cabin that night?

A Yes, I went back to the cabin about 9-9:30.

Q Did you receive or make any calls that night to Mr. Sager or Mr. Buelow?

A No, I think Smithback said he was going to make a call. I said, "When do I get my check?" He said, "Well, your check will be delivered to you in the morning." I said, "Well, I'm not going to be home in the morning." He said, "We'll give it to your wife." I said, "I don't have a wife." He said, [137] "We'll just deliver it to your house and you'll pick it up." I said, "Well, I'm not going to be at my house." He said, "Where are you going to be?" I said, "Hell, I don't know. Maybe I'll be in Chicago."

Q Did you get your check that night?

A No, I didn't.

Q And when did you leave the cabin?

A I left the cabin about 2:45 on the 14th, 2:45 a.m. On the Friday. It would be the 15th. 2:45 a.m. on the 15th. I drove down to the union hall and met with Mike Priem. I was very concerned about my check and Mike Priem and I—

Q Okay. Just a minute.

Okay, go ahead. You had some concerns about your check?

A I had some concerns about my check and why I was left go, and Mike Priem called Ron Sager that afternoon and Ron—

Q Was that the afternoon of September 15th?

A Yes. Ron Sager said, "We put his check in the mail this morning."

MR. PEASE: Objection. That is hearsay.

JUDGE HARMATZ: Sustained.

MS. BRAMMER: As to what Mr. Sager said?

JUDGE HARMATZ: As to what Mr. Sager said. Well, I sustained the objection. He is talking to Mr. Priem on the phone. He said that Mr. Priem called Mr. Sager on the telephone. It is hearsay until you establish a foundation,

[145] Q Did you get an application?

A No, I didn't. Fact is, I asked for the application to be sent to Grand Rapids, Minnesota in care of my sister.

Q Did you give them your full name?

A Yes, I did.

Q Did you indicate to them that you were a Class A or Master Electrician?

A Yes, I did. In fact, I talked to them twice because I give them the wrong zip code for Grand Rapids and called them back and give the right one.

MS. BRAMMER: Nothing else for this witness.

MR. GORDON: Your Honor, I'd like to ask a few questions on the compensation aspect.

JUDGE HARMATZ: Okay.

MR. GORDON: As the witness has been referred to as having received compensation.

JUDGE HARMATZ: Okay.

CROSS-EXAMINATION

BY MR. GORDON:

Q Mr. Hansen, as of September 7th when you went over to the Embassy Suites and applied for employment, were you aware or did you have any knowledge at that point in time that you would receive any compensation from Local 292 by way of differential compensation?

A No, I was not.

[146] Q At the time you were working up at the Boise Cascade facility in September, 12th, 13th and 14th, at that time did you have any knowledge that you would receive any differential compensation from Local 292?

A I had no knowledge of that and I did not know I was going to receive any differential compensation.

Q When did you first learn that you were going to receive some compensation?

A When I first learned I was going to get any compensation for it was the 15th after I got back from the Falls and I was in the hall. I told Mike Priem, "I bought these boots. They cost me 90 bucks. Town & Country told me they was going to reimburse me \$30 of it. They haven't. What am I out, the 90 bucks? I don't wear these shoes normally." Mike said, "We'll the market recovery fund to pick that up for you."

Q And then you subsequently received other compensation representing differentials as well?

A I found out about that approximately the 26th of September.

MR. GORDON: That's all I have, Your Honor.

JUDGE HARMATZ: Okay.

Mr. Pease?

MR. PEASE: I would request affidavits and suggest that perhaps this might be an appropriate time for a lunch break.

JUDGE HARMATZ: Before we do that, let me just ask a few [147] questions that have occurred to me.

What was your shift up there at International Falls?

THE WITNESS: Are you speaking to me?

JUDGE HARMATZ: Yes.

THE WITNESS: We worked at 7. We worked until 5:30.

JUDGE HARMATZ: And how much time did you have for lunch?

THE WITNESS: A half hour.

JUDGE HARMATZ: Okay.

Off the record.

(Discussion held off the record.)

JUDGE HARMATZ: On the record.

Is your witness in place?

MS. BRAMMER: Yes. John Quinn, please.

Whereupon,

JOHN QUINN

having been first duly sworn, was called as a witness herein and was examined and testified as follows:

JUDGE HARMATZ: Watch the wires.

DIRECT EXAMINATION

BY MS. BRAMMER:

Q By whom are you employed?

A I am employed by the State of Minnesota, the Board of Electricity.

Q If I could ask you, please, to close your notebook unless it becomes necessary to open it, and then we can talk about it [148] at that time.

A Okay.

Q Thank you.

How long have you been with the Board?

A I've been with the Board since 1972.

Q And what is your position?

A My position is executive secretary.

Q Could you describe what the responsibilities and authorities of that position are?

A The responsibility and authority of the position is to enforce the Minnesota Statutes governing licensing of electricians, inspections of electrical installations, keeping the Board's records.

Q Okay. And would you briefly describe what the State Board of Electricity is and what its functions are?

A The State Board of Electricity is a board made up of eleven persons appointed by the governor who regulate the electrical industry in Minnesota. They license all the category of electricians and they have approximately sixty field people doing electrical inspections throughout the state.

Q Showing you what has been marked as General Counsel Exhibit 9, can you describe what that is?

(The witness was proffered the document.)

A These are the Board's complete current laws and [149] administrative rules regulating the licensing of electricians and the inspections of electrical installations.

Q And were these in effect on September 11th through the rest of the month of 1989?

A These rules—the majority of the rules went into effect—had been in effect prior to that. There were one or two rules that became effective September 12th, 1989.

Q Just briefly, what did those pertain to?

JUDGE HARMATZ: No, no. There is a rule pertaining to manning, the ratio between journeymen—licensed journeymen and unlicensed personnel?

THE WITNESS: Um-hum.

JUDGE HARMATZ: Was that changed at any time in 1989?

THE WITNESS: That went into effect—I don't have the date that went into effect. That went into effect in December of 1988.

BY MS. BRAMMER:

Q And any rules that may be contained as far as the licensing of contractors, would those have undergone any changes on September 12th?

A There have been some changes in the rules that went into effect on September 12th that added some new re-

quirements for marking of vehicles, advertising requirements, and this nature.

Q Okay. As executive secretary of the State Board of [150] Electricity, do you have access to information regarding applications for electrical contractor licenses?

A Yes, I do.

MS. BRAMMER: At this time I'd like to offer General Counsel Exhibit 9.

MR. PEASE: No objection.

JUDGE HARMATZ:

MR. GORDON: No objection.

JUDGE HARMATZ: General Counsel's 9 is received.

(The document referred to, having been previously marked for identification as General Counsel's Exhibit No. 9, was received into evidence.)

BY MS. BRAMMER:

Q Showing you what has been marked as General Counsel Exhibit 10, can you identify what that is?

(The witness was proffered the document.)

A This is an application for an electrical contractor's license received by the Board from Town & Country Electric of Appleton, Wisconsin.

Q And what is the effective date on that?

A The effective date is 9/11/89.

Q According to Minnesota State Statute, what would be the ramifications of a contractor performing electrical work in [151] this state prior to the effective date of its license?

A That would be a violation of Minnesota Statutes. They would be probably sent a warning letter the first time and taken to court the second time.

MS. BRAMMER: Offer General Counsel Exhibit 10.

MR. PEASE: No objection.

JUDGE HARMATZ: General Counsel Exhibit 10 is received.

(The document referred to, having been previously marked for identification as General Counsel's Exhibit No. 10, was received into evidence.)

BY MS. BRAMMER:

Q Are you aware whether Town & Country Electric had a license in this state prior to September 11th?

A In checking our records, we found no company licensed under that name.

Q Do the Minnesota State Statutes which are in evidence as General Counsel Exhibit 9 address in any way who a licensed electrician must be employed by in order to have electrical work satisfy the statutory requirements?

A Minnesota Statute 326242.6 points out that a person employed must be an employee of the contractor.

Q The contractor that is licensed?

A Yes.

[187] shop”?

THE WITNESS: On my interview I heard them say they were a merit shop.

JUDGE HARMATZ: You did hear them say that they were a merit shop. Did you know what that meant?

THE WITNESS: I basically knew what that meant, yes.

JUDGE HARMATZ: And who said that they were a merit shop? Mr. Buelow, Mr. Sager, Mr.—what's his name?

MR. PEASE: Defferding.

JUDGE HARMATZ: —Defferding?

THE WITNESS: I believe it was Mr. Sager or Mr. Defferding at the interview.

JUDGE HARMATZ: You don't know what a merit shop is, do you?

THE WITNESS: A merit shop is basically a nonunion shop, I believe.

JUDGE HARMATZ: Right. Did you know it then?

THE WITNESS: Why, yeah.

JUDGE HARMATZ: Okay. You may continue.

MR. PEASE: Thank you.

BY MR. PEASE:

Q Going back to before you actually went into your interview with Mr. Sager and Mr. Defferding, when Mr. Sager came out and confirmed that those without appointments wouldn't be interviewed and you said that you did have an [188] appointment, and said you would call Skip Humphrey, isn't it true that Mr. Sager said he would check and if you did have any appointment, they would give you an interview?

A Yeah, he told me he would check after he told me that he would call the police.

Q Isn't it true that in the interview you said that you had always worked union? You told them you had always worked union?

A Yeah, I believe, yeah. I've always worked union.

Q Would you tell us what you told Mr. Sager and Mr. Defferding when you described your work experience to them? I would like to hear what you told them.

A I told them—they wanted me to go back to I think 10 or 15 years. I said, “No, I would go back to 1956 when I started. I started in 1956 as an operator on a line job between Aurora and Schroeder on the North Shore. I went in the service. I come back. I put my apprentice in through the line job in 1965. I was up at Pengilly, Minnesota. I was general foreman on a job for Bechtel Corporation. I then returned to the cities. I worked on the missiles. I worked

in refineries throughout the country. I worked in Alaska. I've done high voltage work. Worked for the City of Minneapolis. I've worked in hospitals. I've worked in powerhouses, and so forth." The best of my recollection. I can't —

[189] Q Did they ask you anything about doing any rigid conduit work?

A I believe they asked me about rigid conduit.

Q And what was your — what did you say at that time?

A I think I probably told them I was probably one of the best rigid conduit people in this local.

Q Did you say anything about the extent to which you had actually run jobs, rigid conduit jobs?

A Yes, I have.

Q No, I want to know what you told them.

A Well, when I was a general foreman for Bechtel Corporation I was running rigid conduit.

Q Did you tell them that at the interview?

A I could of or I couldn't of. I can't remember. That was three months ago.

Q Isn't it true that there was some union people working on the Boise Cascade — construction workers working, performing maintenance work or work inside the facility, at the Boise Cascade project?

MR. GORDON: Objection. Irrelevant.

MR. PEASE: There was an assertion that the customer said you can't use any signatory employees.

JUDGE HARMATZ: Yes, well how does that collide with the customer's use of union people? How is that?

MR. PEASE: Well, Town & Country's customer is Boise [190] Cascade.

JUDGE HARMATZ: The fact that the — never mind. Go ahead. Overruled. I don't consider this to be relevant, but I'll let you ask it.

THE WITNESS: Restate your question, please.

BY MR. PEASE:

Q Isn't it true that there was a masonry — a union masonry contractor working in generally the same area that you were in at the Boise Cascade facility?

A I don't know that they were union, no.

Q Isn't it true that when you were at the — on the job at the Boise Cascade facility that you showed Town & Country Electric employees a picture ID identifying yourself as a union organizer?

A I've never had a picture identifying myself as a union organizer.

Q Would you answer the question?

MR. GORDON: I believe he did.

THE WITNESS: No, I have never had a picture that identified me as a organizer.

BY MR. PEASE:

Q Going back to the Embassy Suites interview, isn't it true that in the — after the — Mr. Sager and Mr. Defferding called you back in and told you that you would be accepted, or whatever they told you, isn't it true that Mr. Sager told you

[193] A West of Minneapolis.

Q West of Minneapolis. About how far?

A I think from Highway 494 and 55 it says it's 29 miles, so that's probably 20 miles off to that point. I suppose 50 miles from downtown from this building right here approximately.

Q You referred to a market recovery fund, the union's market recovery fund. What is that? What is it?

A I don't completely understand all of it, but it's monies that they use to target jobs with to get jobs to compete with nonunion contractors.

MR. PEASE: I have no further questions of this witness at this time.

JUDGE HARMATZ: General Counsel?

REDIRECT EXAMINATION

BY MS. BRAMMER:

Q On Respondent's Exhibit 8, which is the long paper with some handwriting on it, do you recall at what date those notes were documented?

A Those notes were documented on the 15th and the following Monday after the 15th of September from notes that I had kept at the Falls.

Q Referring you to the day that Bob Johnsen was at the Boise Cascade job site, at the time that Johnsen had asked to see your license, was Smithback near you at that time?

[200] control, and it is hard to overcome that hurdle so anyhow, you can consider it.

MS. BRAMMER: Okay. This is what — I think potentially I had one witness I was going to call on some joint employer question and also some other reasons. Maybe I could just ask that witness some joint employer related questions and then forego a couple of the others I was thinking of.

JUDGE HARMATZ: Right. That might be good.

MS. BRAMMER: Okay.

JUDGE HARMATZ: That might be good.

MS. BRAMMER: I'll think about that. Thank you.

JUDGE HARMATZ: Off the record.

(Brief recess taken.)

JUDGE HARMATZ: Okay.

Go ahead.

MR. PEASE: Local 292 has produced a photocopy of its check to Malcolm Hansen and it is my understanding they are prepared to stipulate with us to the authenticity of that as the payment referred to by Mr. Hansen.

JUDGE HARMATZ: Okay.

MR. PEASE: Offer Employer 9.

MR. GORDON: We are prepared to stipulate that that includes monies paid to Mr. Hansen.

MR. PEASE: Right.

MR. GORDON: Correct.

[201] JUDGE HARMATZ: What else will it consist of?

MR. GORDON: Well, it is all money paid to Mr. Hansen. I think if we want to establish whether all those monies were paid to Mr. Hansen in connection with his activities up at Boise, then that would be a subject of inquiry.

MR. PEASE: Well, then we ought to do that.

MR. GORDON: Yes.

JUDGE HARMATZ: Okay.

MR. GORDON: I mean that's —

MR. PEASE: Where is he?

MR. GORDON: Or maybe I can find that out and do it by stipulation.

JUDGE HARMATZ: Okay.

MR. PEASE: That's fine.

(Pause.)

MR. GORDON: Okay. It is all money in connection with his accepting employment with Town & Country at Boise.

JUDGE HARMATZ: Okay. Pursuant to that agreement on this document, Respondent's 13 is received.

MR. PEASE: Respondent's 9, I believe.

MR. GORDON: Your Honor —

JUDGE HARMATZ: Is that Respondent's 9? I'm sorry. I gave the General Counsel credit for that.

MR. GORDON: Is it too late to object to relevance?

JUDGE HARMATZ: Huh?

[202] MR. GORDON: I stipulated to authenticity.

JUDGE HARMATZ: No, it's not too late.

MR. GORDON: I'd like the record to at least show an objection based on relevancy to that document.

JUDGE HARMATZ: Okay. Overruled.

Respondent's 9 is received.

(The document referred to, having been previously marked for identification as Respondent's Exhibit No. 9, was received into evidence.)

JUDGE HARMATZ: Okay. All right. Now, Ms. Brammer?

MS. BRAMMER: Okay. During the recess I did carve several pages of testimony out so—

JUDGE HARMATZ: I know how hard that was for you.

MS. BRAMMER: Steven Buelow, please.

JUDGE HARMATZ: Steven Buelow.
Whereupon,

STEVEN BUELOW

having been first duly sworn, was called as a witness herein and was examined and testified as follows:

DIRECT EXAMINATION

BY MS. BRAMMER:

Q Would you spell your last name for the record, please?

A It's B-U-E-L-O-W.

[203] Q And you are president of Ameristaff, is that correct?

A Correct.

Q And one of your clients is Town & Country Electric, is that correct?

A Yes.

Q And about how long has that relationship existed?

A Since June of 1987.

Q And have you had Town & Country as one of your clients on job sites other than the Boise Cascade job site in International Falls?

A Correct.

Q Have you had them as a client for any jobs in the State of Minnesota prior to September, 1989?

A No.

Q How is Ameristaff compensated for its services to Town & Country, and specifically for Malcolm Hansen who—first let me ask this. Was Malcolm Hansen the only employee who was obtained by Ameristaff for the Boise Cascade job?

A Malcolm was the only Ameristaff employee that worked at Boise Cascade.

Q Okay. And how did Town & Country compensate you for your services regarding Malcolm Hansen?

A We billed them as we bill any other employee.

Q And how is that?

A We have a formula that we multiply times the wage, add in

[208] A Would you rephrase that?

Q Yes. Were those qualifications that were articulated to you by Town & Country some time prior to September 7th?

A Yes.

Q Whose idea was it for Ameristaff to prescreen anyone who called in response to your advertisement?

A The—I guess generally we would have done all the screening and additionally the interviews as well.

Q Whose idea was it for you to do that?

A That is the service we provide for our clients.

Q You always prescreen calls?

A Right.

Q And who establishes the criteria used in those prescreenings, the client?

A We have—we get an idea of what the company is looking for, correct.

Q So based on what the company tells you they are looking for, you establish criteria that you would use for prescreening?

A Right, and—

Q Okay.

MR. PEASE: I believe the witness was going to continue.

MS. BRAMMER: That was responsive to my question.

BY MS. BRAMMER:

Q Now when a caller would respond to the advertisements in [209] the Minneapolis paper for licensed journeymen electricians that had Ameristaff's number in that ad, you answered those calls on occasion, didn't you?

A Sure.

Q Okay. And when you answered those calls, you asked if they were interested in union or nonunion work, didn't you?

A I believe I asked their preference, yes.

Q Okay. And you instructed Lorrie O'Mellan to do the same, is that correct?

A Sure.

Q Okay. Now that wasn't your idea to ask that on the phone, was it?

A To ask if they preferred union?

Q To ask if there was a preference for union or non-union work.

A I believe it was, yes.

Q You came up with that on your own?

A I guess if I could explain, and this might get a little longwinded. I don't know what you want me to say. This

refers back to another case involving Town & Country, maybe a month or two prior to that.

Q No, I don't think that would be relevant.

A Okay.

Q But what I want to know is you have testified that based on criteria that your clients tell you they are concerned [210] about, you would formulate some kind of prescreening questions as a routine service to your clients?

A Generally that is not done at all on the phone. Usually the people come in and fill out applications. In this case they were calling in from out of state. We needed to simply verify that they were available for work at the project up at Boise, yes.

JUDGE HARMATZ: But you knew at the time you were getting these responses, from the very time you got the first response to the ad that was in the Minnesota—Minneapolis paper, you knew that the qualification had been established for people willing to work for a merit shop?

THE WITNESS: Correct.

JUDGE HARMATZ: And that simply translated to you into this question you asked prescreening what their preference was?

THE WITNESS: Correct.

JUDGE HARMATZ: Okay. You may continue.

BY MS. BRAMMER:

Q And then you relayed the information that you gathered from those proceedings to Town & Country, is that correct?

A Some time later, yes. Initially I didn't know the job was at Boise.

Q Some time between September 1st and September 14th you relayed that information?

[235] the ads that were run on Sunday. I called Ron some time late morning or whatever to tell him that there was a

fairly decent response coming in. At that time I told him I'd get back to him. He called later and talked to Christine, and Christine informed Ron that I had planed to come out to Minneapolis, rent out some space and conduct some interviews.

Q I just—what I would like you to do. Were there some conversations in which Mr. Sager told you the qualifications or the criteria that you were to use in finding people for him?

A Yeah. I don't know exactly when it would have been. I guess it would have been on September 5th. The 1st is when we initially just talked about "are there any people available". The 4th was Memorial Day. Nobody worked on Monday. So I guess it would have been Tuesday morning, on the 5th, Ron said the people had to be willing to travel. They had to be willing—he made it clear that he wanted them to be able to work a merit shop job.

Q What did you understand him to mean by that?

MS. BRAMMER: Objection.

JUDGE HARMATZ: Overruled.

BY MR. PEASE:

Q What did you understand him to mean by that statement?

A To be able to work the job. I didn't know where the job was at at that time, but what it meant, Ron said it was a new [236] client of theirs. He wanted to make sure that people were willing to work a merit shop job. This goes back to what I asked the other counsel if they wanted me to get into. Some time before that Ron needed somebody to bend some pipe, and I knew an electrician who was a member of the Appleton Local. I asked him if he would go there to work this job, and he said, "No, because it was with Town & Country", and I said, "So what"? And he said, "Well," he says, "I can't go to work there." And I

said, "Well, why can't you go to work there?" He said, "Because I signed an agreement saying I wouldn't go to work for a nonunion contractor." He said, "Find me work with somebody out of the Green Bay Local," and then he said, "My local won't know about it and it will be fine, or else find me work with a union contractor," so we did end up placing the guy with Valley Electric, a union contractor out of Appleton.

What that tells me is—

JUDGE HARMATZ: Do you want to know what it tells me? Nothing.

THE WITNESS: Okay.

JUDGE HARMATZ: But go ahead.

THE WITNESS: What that tells me is that when Ron says if they have to be available to work at—that's where the whole question of do they prefer union or nonunion work. If they said they prefer—if they said it didn't matter, okay, [237] fine, it doesn't matter, but if they said they preferred union work, then we had to ask, "Will you work a nonunion project because if you won't accept that job,"—you know, I never heard anything about the salt rule until today, that they could go to work.

JUDGE HARMATZ: Okay. The long and short of it is—

THE WITNESS: I needed to find out if they were available.

JUDGE HARMATZ: —you, just like myself and everybody else in the trade who has any sense of honesty, acknowledges the fact that merit shop is the same way to describe the term that is used to describe a nonunion shop.

THE WITNESS: That's how I understood it.

JUDGE HARMATZ: Sure.

BY MR. PEASE:

Q Did Town & Country tell you to screen out union members?

A No, it was again Ron said that they had to be willing to work this project, and that's what I — when I questioned people or when I asked Lorrie to screen, they had to be available to work the project. There were some who outright refused to work up there. Obviously then they are not available to work.

Q When a client, any client, says that they no longer wish to use an Ameristaff employee, does that mean that Ameristaff automatically terminates the employee? What happens when an

[255] A I think we had a couple of contracts, yes.

Q Where were those?

A I believe the Hastings Dam and I think there was another project that was on the outskirts. I just heard that we had a couple of them. I don't know for sure. I know Hastings was one of them.

Q You were first licensed in this state on September 11th, is that correct?

A I don't know. I just saw that document for the first time today. I don't — ma'am, I don't take care of those things in the company.

Q Okay. As of September 7th, have you done any work in the State of Minnesota other than the Boise Cascade job?

A Since September 7th?

Q Right.

A Not to my knowledge.

MS. BRAMMER: Nothing else.

MR. GORDON: I don't have any questions.

MR. PEASE: Just a few to clarify the record.

CROSS-EXAMINATION

BY MR. PEASE:

Q Where were you a member of the IBEW?

A In Appleton, Wisconsin. Local 577.

MR. PEASE: I intend to call this witness as part of my case.

[258]

CROSS-EXAMINATION

BY MR. GORDON:

Q Mr. Sager, in that first two or three week period in September, 1989, you were needing electricians for the project or job you had at Boise Cascade —

MR. PEASE: Object. Beyond the scope.

JUDGE HARMATZ: Beyond the scope.

MR. GORDON: May I ask, Your Honor, why the company did not ask for the applications from Ameristaff?

JUDGE HARMATZ: No. Beyond the scope. But you can write it down. I'm sure it's going to be within the scope later.

MR. GORDON: I have nothing further.

JUDGE HARMATZ: Anything further?

MR. PEASE: Not from me.

JUDGE HARMATZ: Thank you, Mr. Sager.

(Whereupon, the witness was excused from the stand.)

MS. BRAMMER: Roger Kolling. I'll go get him.
Whereupon,

ROGER KOLLING

having been first duly sworn, was called as a witness herein and was examined and testified as follows:

DIRECT EXAMINATION

BY MS. BRAMMER:

Q Would you spell your last name for the record, please?

A Yes, it's K-O-L-L-I-N-G.

[259] Q And by whom are you employed?

A I'm employed with Kuntz Electric. He's a nonunion contractor in Rochester.

Q And are you employed by an local union?

A I am now, yes.

Q And what is your position with the local union?

A I was put on as a business rep on the 4th of December.

Q And what local is that?

A 343.

Q Are you a licensed electrician?

A Yes, I've got an A Master's License.

Q Would you repeat that, please?

A Yes, I've got an A Master's License.

Q Showing you what has been marked as General Counsel Exhibit 16, could you take a look at that and identify that if you can?

(The witness was proffered the document.)

A Yes, this is a job service introduction card that —

Q I'm sorry. What did you say?

A This is a job service introduction card that Dick Perez gave me on the 18th.

Q And Dick Perez is who?

A He is the second in charge of the job service in Rochester, Minnesota.

Q Okay. And this served to introduce you for the purpose

[266] current business rep there. Do you know when Local 343 was chartered?

A It was about thirteen years ago when we were chartered.

Q Does the local have bylaws?

A Yes.

Q And it is affiliated —

A Affiliated with AFL-CIO.

Q And do you know how many bargaining units are represented by the local?

A Well, basically we've got three.

Q And do you know whether employees are involved in levels of the local union's activities?

A We have a lot of volunteer action going on with employee involvement, yes.

Q Employees on negotiating committee?

A Yes, we have volunteers on the negotiating committee.

Q Bargaining unit employees on the executive board?

A On the executive board.

Q Okay. How many contracts are negotiated and administered by Local 343?

A Well, basically it's three. You know, we have our regular inside agreement. We have a space agreement which is low voltage and then we have a residential agreement.

Q Okay. I have one more question to ask you as business rep for 343. I'm going to name some names and I want you to [267] tell me if they are on the payroll of Local 343 or not. Ken Axt?

A No.

Q Harley Barton?

A No.

Q Roger Chartrand?

A No.

Q Stephen Claypatch?

A No.

Q Dave Hagen?

A No.

Q Bob Ahlman?

A No.

Q Craig Jones?

A No.

Q Steven Shannon?

A No.

Q Steven Leyendecker?

A No.

Q Michael Priem?

A No.

Q Robert Printy?

A No.

Q Greg Shafranski?

A No.

[268] Q Donald Larson?

A No.

Q Malcolm Hansen?

A No.

MS. BRAMMER: Okay. Nothing else.

CROSS-EXAMINATION

BY MR. GORDON:

Q How many employers do you have that are covered by those three basic agreements that you've got?

A Well, we have a multi-bargaining unit. In other words, all of the contractors, approximately forty of the contractors, are—belong to that multi-bargaining unit.

Q So approximately forty employers covered by the inside—

A Inside agreement, yes.

MR. GORDON: That's all.

MR. PEASE: Does General Counsel have a statement?

MS. BRAMMER: Yes, I do. I have an affidavit and also an attachment that was provided with that affidavit, and also General Counsel Exhibit 16 was attached to the affidavit.

MR. PEASE: May we have a brief recess, Your Honor?

JUDGE HARMATZ: Five minute recess.

(Brief recess taken.)

BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION EIGHTEEN

In the Matter of:

Case No. 18-CA-11035

TOWN & COUNTRY ELECTRIC, INC., AND
AMERISTAFF PERSONNEL CONTRACTORS, LTD., RESPONDENT,

and

CHARLES EVANS, AN INDIVIDUAL, CHARGING PARTY.

Case No. 18-CA-11044

TOWN & COUNTRY ELECTRIC, INC., AND
AMERISTAFF PERSONNEL CONTRACTORS, LTD., RESPONDENT,

and

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS,
LOCAL 292, AFL-CIO, CHARGING PARTY.

Case No. 18-CA-11080

TOWN & COUNTRY ELECTRIC, INC., AND
AMERISTAFF PERSONNEL CONTRACTORS, LTD., RESPONDENT,

and

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS,
LOCAL 343, AFL-CIO, CHARGING PARTY.

Wednesday, December 13, 1989

[294] Room 471
Federal Building
110 South 4th Street
Minneapolis, Minnesota

The above-entitled matter came duly on for hearing pursuant to notice, at 8:25 a.m.

BEFORE: THE HONORABLE JOEL A. HARMATZ
Administrative Law Judge

APPEARANCES:

*On behalf of the General Counsel
National Labor Relations Board:*

FLORENCE I. BRAMMER, ESQ.

Region Eighteen, National Labor Relations Board

Room 316 Federal Building

110 South 4th Street

Minneapolis, Minnesota 55401

On behalf of the Respondent – Town & Country:

JAMES K. PEASE, JR., ESQ.

Melli, Walker, Pease & Ruhly, S.C.

119 North Martin Luther King, Jr. Drive

P.O. Box 1664

Madison, Wisconsin 53701-1664

On behalf of the Charging Party:

STEPHEN D. GORDON, ESQ.

Gordon, Miller & O'Brien

1208 Plymouth Building

12 South 6th Street

Minneapolis, Minnesota

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PROCEEDINGS

8:25 A.M.

JUDGE HARMATZ: The Hearing is in order. Mr. Pease.

MR. PEASE: Call Ron Sager.
Whereupon,

RONALD SAGER

having been previously duly sworn, was recalled as a witness herein and was examined and testified as follows:

DIRECT EXAMINATION

BY MR. PEASE:

Q By whom are you employed?

A Town and Country Electric, Incorporated.

Q And what is your position with Town and Country?

A I'm Manager of Human Resources.

Q How long have you held that position?

A Since May 8th of 1984.

Q What are your duties and responsibilities in your current position?

A I handle all personnel functions, all benefit lines, all of the indentured apprenticeship training, I also handle all of the incoming litigation and all of the education for the company.

Q Would you please briefly describe for us the work of Town and Country Electric?

[297] A We are a electrical contractor, have been in business since 1972 and started out in mainly light commercial and medium commercial jobs and in the last six years we have grown from around 29 to 30 employees to approximately 260.

Q Can you give us some indication as to the comparative size of Town and Country with—for example with respect to other non-union contractors in the State of Wisconsin?

A We are the largest merit shop or non-union company in the State of Wisconsin, I believe the 14th largest merit shop in the country and the 85th or 90th in the of all electrical contractors in the United States.

Q To your knowledge, to what extent if at all has your company been targeted for unionization by the IBEW?

A I first became aware of that a few years ago, I don't know if it was three or four years ago. A former employee of the company's founder father, Rollie Stephenson's father from Stephenson's Electric, then became a business agent, I had worked with him at Stephenson's Electric and Bob Stephenson was on the joint apprenticeship committee at the time, before he started with Town and Country.

We were invited over to a tavern that he owned, called the Job Site. At that time a business agent, Wesley Carlson informed us that we were—

MS. BRAMMER: Objection, hearsay.

JUDGE HARMATZ: Overruled.

[314] to him at that time.

Q Just for background, you mentioned you had worked for job service. When was it that you worked for job service?

A I don't know what date in January of 1979 and I worked there until May 5th, 1984.

Q And where was that work performed?

A Wisconsin Job Service Office.

Q And where was that Job Service Office located?

A In the Appleton area.

Q What happened after the Weseman interview ended?

A Steve Buelow came in and I said, "whose the next appointment" or he was in there or he came in, he was going in and out making phone calls from the bedroom and in and out and he said "none of them have appointments". I said, "what do you mean, all these people, how did they hear about us", he said, "I don't know they're here".

And I said at that point, I don't know what time it was, but I said, "hey if they—we've got to get back, we're late, none of them have appointments?" and he says "no" and I says, "well, why don't you double check if they don't have appointments" and Denny and I talked about it, I'd like to get back for the meeting, as bad as we need people, I don't know who these people are, if you didn't screen them like the others. And he says, "well I just—I'll call the rest of them", and I said, "go and check". He came back and—it was [315] a few minutes later and he said, "they are getting quite vocal and rude in there", I don't know if he used those words and I said, well—"then they won't leave". And so I said, "I'll go in there".

I think Steve and I walked in there, I started talking to them, I think Steve left after I starting talking to them and they were—they used some really rude language and a couple of them were grumbling, I don't know who they were in particular, I do know that I saw Malcolm sitting at the table closest to the window and there was a guy standing behind him.

I said, "look, if you guys aren't going to leave, I'm going to have to call hotel security and I'll let them deal with it because I just don't have time for this, I have to get back".

It was at that time that Malcolm says, this is bull shit or something to that effect, he says "I called and I have an appointment and I want my damned appointment or I'm going to call Humphrey" or somebody like that, I didn't know who the guy was at the time.

It was at that point I says, "I don't give a damned who you call, but if you've got an appointment I will check it out and I will honor that commitment" and that's what I said.

So I went and got Steve or Steve was out in the hallway or something and I said "Steve, can you check and see if this guy had an appointment", I believe he called his office and [316] said that Malcolm Hansen called in that morning. I wasn't going to argue or belabor the point and I went back in and I said, "I'm sorry, we will interview you but I will not interview anybody else, because we've got to get going".

It was at that point that we brought Malcolm in, Dennis and I and we started talking to him and there were a lot of questions asked and I don't recall all of the question—

Q Try to—as best you can, tell us what happened.

JUDGE HARMATZ: Excuse me, at that point when the people—when you spoke to the men, at the point where you had to threaten them with calling security, did you know or suspect that these people had union affiliations, any of them had union affiliations?

THE WITNESS: Yes.

JUDGE HARMATZ: You knew that they did?

THE WITNESS: Yes, I did because I think it was Steve Buelow said, it looks like all these guys—he went through the application and I think he was paging through them and he says "one is back in the room", before I went back into the room and told them that I wasn't going to interview anymore.

At that point in the back of my mind, I felt this was—that we in fact were being setup or harassed and it was at that point that I became somewhat defensive and I went into the room and I explained to them, I said, "hey look guys, we've got to get the people who had appointments, if

you [317] don't have an appointment, I refuse to interview you. We will not interview you".

JUDGE HARMATZ: Okay, so as part of this process of reporting to you what was going on in the waiting room, Buelow told you that he felt you were being either set up or harassed—

THE WITNESS: Right.

JUDGE HARMATZ: —by the union.

THE WITNESS: I think he showed a couple of applications and a couple of the applications on it—he said, "I think they're union" and he says, "I don't know what you want to do" and it was at that point we made the decision.

Then when I say "we", that was Dennis and myself.

JUDGE HARMATZ: Okay.

BY MR. PEASE:

Q At what stage—you had previously told us about a statement you made to Steve Buelow about—to the effect you were not going to interview the people who did not have an appointment?

A Yes.

Q Was that before or after Steve reviewed those applications and spoke to you as you've just described?

A I think it was—I said that to Steve before, before I went into the room. He told me that these people didn't have appointments and it looked like they were not the same ones [318] that he had set up.

I said, "well just tell them, I don't want to interview them, go in there and tell them." So Steve went back in there and came back and they were unruly and that's when I went back in there and told them.

Q At what point was it that he came in with the Applications, that Steve Buelow came in with the applications?

A He came in—people were still filling out applications at that time, some people were still filling out applications when I went in there.

Q So, it was after he got those applications?

A Yes, I think it was after Malcolm Hansen—after the first interview or something like that, after we had Malcolm Hansen interview or something like that. After we had Malcolm Hansen go out into the hall and Denny and I wanted to talk about that, that's when I think Steve was going through the applications at that point.

Q All right. I believe that you—

JUDGE HARMATZ: So Buelow reported to you that he felt that some of the people in the waiting room were not the people who had appointments?

THE WITNESS: Right.

JUDGE HARMATZ: And at that juncture, you said we're only going to take the people with appointments?

THE WITNESS: Right, because I didn't know who the other

[331] THE WITNESS: Yes, I do.

JUDGE HARMATZ: So everybody who does resign from the union would face the possibility of losing those benefits, you know that didn't you?

THE WITNESS: Resigning from the union or not working for the union?

JUDGE HARMATZ: Well, let me ask another question. You also knew that there were constraints in the international constitution against working non-union?

THE WITNESS: Yes, I knew that.

JUDGE HARMATZ: You knew that. And you also knew as you indicated to me, you also knew that employees who are union and who lose membership either

by expulsion or by withdrawal, resignation stand to lose retirement and health and welfare? You knew that too didn't you?

(No response.)

JUDGE HARMATZ: Let me put it another way. You know that the pension credits are based on multi-employer agreements that accumulate credits on the basis of work with signatory employers?

THE WITNESS: Okay, I am not that familiar with all of those types of things because we have people that are in the union that work for our company that—in fact we had one by the name of Jim Schreiter that was getting health benefits for over a year from the union, his health insurance and then he

[348] and you said that you had them at home.

And I guess that he hung up the phone and I don't think he was real happy about it and then Rod called me back and said that Malcolm was really angry at him over this whole issue.

Q Was there anytime that you were contacted from the job site, anything to the effect that Malcolm was or appeared to be a union organizer?

A Also on Wednesday, Rod Smithback called me, I don't know the sequence of events, I had so many phone calls that day, I tried to diffuse the situation. I told Rod, I said, "if you said he's an organizer or if he's talking union", I said, "you can't prevent him I want to give him the parameters of that". I said, "you can't tell him not to talk about anything on his break time, his lunch hour, before work or after work, on his personal time if he's in the restroom, whatever, you can't prevent that".

I said, "if he's talking too much, whether it's union, religion, sex, politics, hunting, fishing, whatever", I said,

"if he's talking too much while he's working, you can go up and say 'hey a little less talking a little more work', you can say that".

And I think Dennis Defferding was in my office at the time when I gave those instructions to Rod.

Q What' the next conversation that you recall regarding [349] Malcolm Hansen?

A Regarding Malcolm Hansen, I thing I called Steve Buelow up at that time, I don't know if it was Wednesday or not. I think it was Wednesday, I know I called him Tuesday for the increase and Wednesday I think I talked to him about, I didn't know if we were going to keep Malcolm, that we were evaluating him for productivity and safety violations.

But I said safety violations were not that serious except that he didn't have his shoes and I'd get back to him. Then I talked with Dennis Defferding and I think Malcolm called me again with some questions and I don't recall what the questions were. I really don't.

Thursday I talked with Dennis Defferding and Bob Stephenson and Rod Smithback and Malcolm Hansen, all relating to the Boise Cascade situation.

It was at that juncture that I talked with Dennis and I said, "Listen we've got to make a decision here, the guy is affecting the morale of the people, I know that a couple of our people were upset and one extremely agitated, he was getting a short fuse and one of the guys felt intimidated and wanted to leave the job site", I said, "Listen, I don't care if we aren't working at that job site, I've got to look out for our personnel, we can't do that to them".

And then Denny said, "listen, I'll make a phone call and see if I can address the situation" and I said, "well whatever [350] you do, I'm about to go to the President of the Company and tell him this whole deal", I said, "I don't

want to go over your head or anything but we have to take care of right now".

Q How did you know that someone was getting very agitated among the crew?

A Rod Smithback called.

Q What had he told you?

A He told me that Randy Reinders —

MS. BRAMMER: Objection, hearsay.

JUDGE HARMATZ: Basis for action, overruled.

THE WITNESS: Do I —

JUDGE HARMATZ: Go ahead.

THE WITNESS: He told me that he was afraid that Randy Reinders was going to get angry and do something. He said that "Mike Grow wants to leave the job site right now, he's extremely nervous and upset" and made reference to — for his own safety — was upset.

He didn't say anything about Tom Steiner, he said that Tom's kinda fed up with all the talk and he said there's real low morale on the job right now, although he said that "the guys are trying to do the best job they can".

BY MR. PEASE:

Q Was there some point that —

JUDGE HARMATZ: Did he tell you why?

THE WITNESS: Pardon?

[351] BY MR. PEASE:

Q Did they say why Reinders was upset?

A Rod said to the effect that Malcolm was just talking to him all the time, agitating him and he didn't get into all the — I said, "whatever it is, just keep the two apart, you know, try to move them to a different job function, whatever you have to do, I have to make a decision today and we have to take care of the situation".

And then I said to Rod, when he called me back the last time, I said, "hey, a decision has been made that we are go-

ing to let Malcolm Hansen go from Ameristaff" and I said, "I'm going to call Steve Buelow and tell him the situation and have Malcolm call Steve Buelow after—in the afternoon".

And Rod said, "can I wait until after work" and I said, "sure, that's normal", and he said, "I don't want to create any conflict on the job site before his work hours are over with, I don't want him running through the mill, that sort of thing". I said, "okay, that's fine, whatever you have to do, just have him call Steve", and that's when I called Steve and I told him what we were going to be doing and asked him if he would take care of that, since he worked for Ameristaff.

Q What did you say to Steve about why you were doing what you were—

A I said to Steve, I said, "The guys really causing problems, he's wandering around, we got low morale on the [352] job", no I didn't say low morale, I said, "we have low productivity from him". I said, "he just got his safety shoes today", I said, "he's just not an employee or potential employee that we would look to be hiring", I said, "we just don't want to get into that".

Plus, you know, the situation that I informed you about earlier, we can't have temporaries on the job. And then Steve said, "I think I'll just—rather than tell him about—dwelling on the low productivity and things like that, I will just tell him that we can't have temporaries on the job".

I said, "well whatever you have to do, you just explain to him, if you don't want to create an issue that's up to you".

Q Did you have any conversation with Malcolm after that conversation?

A I think he called me up and I said that Steve would be—he wold [sic] be talking to Steve at Ameristaff and he said "what's happening, what's going on"? and I said, "well call Steve at Ameristaff" and he said, "well am I done working, what's the story, am I being terminated because I'm an organizer?" I said, "Just call Steve Buelow, he'll address the situation with you". He said, "Well when am I going to be picked up by Town and Country Electric?" I said, "you're not".

He said, "well why, what's wrong"? I said, "call Steve Buelow".

[353] Q At any time did you eve [sic] explain to Malcolm why you weren't picking him up—Town and Country wasn't picking him up?

A I informed him the first time about low productivity and I said "it hasn't improved significantly".

Q When did you tell him that?

A The same day, Thursday.

Q Okay. How often, starting from the time you interviewed Malcolm through the decision to stop using him on September 14th, how often did you raise Malcolm's rate?

A Well just once.

Q And from what to what?

A From \$15.00 to \$16.00 an hour, that was on Tuesday, afternoon, I think it was the middle of the afternoon, early, late somewhere around there and then—it had to be after 1:30, I know that.

And then I offered the extra \$8.00 per day, per meals, per working day.

Q To what extent if at all, during the week of September 11th, did you have any conversation with Malcolm in which you said anything to him about his talking about union?

A I'm just trying to recall specifics. I think I said to him or he said, "I'm going to not stop talking about the

union" or something to that effect and I said "I don't care what you talk about as long as it's on your own personal time, [354] if it interferes with your work, that's another story". Also, I said, "you can talk about anything you wanted on your breaks, your noon hours, your own personal time before work, after work, at the lodge, whatever, but you can't talk about it on your work time, if it interferes with your work".

I said, "same way if you were talking about baseball or hunting or fishing, religion, politics, telling a joke whatever". I guess I left it at that.

Q Do you know when that conversation or conversations took place?

A Either Wednesday or Thursday.

Q Do you recall whether there was more than one conversation when that subject came up?

A No, it could have been two calls.

Q In either of those calls, did you make any statement to the effect or relating to what Boise Cascade or the customer wanted or wold [sic] allow?

A No. As I told you before I didn't have the information from the contract, all I had was the safety information, that's all I get.

Q At any time during the week of the 11th, did you have any conversation with Malcolm that said anything to the effect that—asking what it would take to get him to forget organizing or to stop organizing or something like. Was there any statement to that affect?

[355] A No, I never said anything like that.

Q On Thursday the 14th of September, did you—when you talked productivity to him, productivity problems, did you say anything to the affect that you would call him at 7 p.m. to straighten it out? That you would call Malcolm at 7 p.m. to straighten this out, the productivity issue?

A No, absolutely no. Why wold I say that if I—

Q I just wanted to know if you said it.

A No.

Q Did you receive on the 14th, did you receive any kind of a telephone call from Rod Smithback regarding Malcolm's productivity?

A On Thursday?

Q On Thursday, the 14th, correct.

JUDGE HARMATZ: Was Thursday the 14th?

Yes.

THE WITNESS: I might have in the morning. He mentioned to me that his productivity had not significantly increased.

BY MR. PEASE:

Q Anything else that you can recall brought on productivity on the 14th?

A He mentioned something about some of the mistakes or some of his work specifics and I don't recall because it wasn't germane to me at that time, I think the decision had pretty much been made at that juncture.

[362] concerned about some of the questions we had asked him before and he was worried about if he was union, that we wouldn't hire him and I told him that that wouldn't make any difference.

Questions concerning Town and Country, talked about philosophy, talked about Town and Country how they operate, he also brought up the fact that he felt that he was being discriminated against by two other employers in the Minnesota area and that he had been working with Mr. Perez from Job Service and when he said that, I said, he should have Mr. Perez call me if he had any questions regarding our conversations. He was real guarded, really hard to pull things out, it was almost like he was trying to lead me on or trying to get me into saying something that

I shouldn't and I was on my guard at that time.

And that's when he told me he was taping the conversation and then I'm always upset when people say they are—tape a conversation after they have talked to you because I just don't like to be taped, I mean that's just my personal thing, I don't know who likes to be. So I may be—

Q What statement did he make about taping conversations?

A He said he taped the conversation yesterday and that he was concerned about my asking questions relating to the union and I told him that the only reason I was asking questions pertaining to his employment history or the questions I asked [363] him were—I like to document whoever calls for statistical purposes if we get into that later on that, if we hire him or who we hire I can document that. We've got a lot of people in our company that I don't think have ever terminated their union status. Some of them still get letters I think that they are going to be fined or something. So I'm always really guarded at junctures when people say they are taping conversations and they are using this and the questions that they ask. I just feel uncomfortable.

Q Do you generally ask people about their union affiliation?

A No.

MS. BRAMMER: Objection, vague. Ask people in what context.

MR. PEASE: That are seeking information on employment at Town and Country.

THE WITNESS: No.

BY MR. PEASE:

Q What are the circumstances on which you have—are interested in that information?

A What are the circumstances, what—that I am?

Q When people call in and they are interested in work for or with Town and Country, you've indicated that you will—that you have some interest in that and that you keep some record of that, would you please explain that?

[387] Q Would you agree that that contains no details about their past experience or qualifications?

A I would agree.

Q The one thing on the Ameristaff screening that was not on the application was the union with the yes and no boxes, is that correct?

A Yes.

Q At those interviews, not only did Mr. Buelow tell you he thought they were union, but some of those applicants had identified themselves to you as being union members, is that correct?

A Yes.

Q Moving onto Mr. Hansen, when you were interviewing Mr. Hansen, you did more than just tell him that you thought he was colorful, you told him that he was the most qualified applicant of thousands that you'd interviewed, didn't you?

A No, I did not.

Q Did you tell him you thought he was qualified?

A Yes, I did.

Q Now you testified that Boise Cascade did not dictate to you any criteria for your employees on that site, so to the extent that you told Mr. Hansen during the interview that you didn't want any problems about the union, that was your concern on the part of Town and Country?

A Would you?

[393] in the morning.

JUDGE HARMATZ: It could have been as early as the 5th?

THE WITNESS: Yeah, I think it was the day after Labor Day. It was either late in the afternoon or late in the evening on the first before we went into the Labor Day weekend or it was on that Tuesday after—in the morning. I remember calling Steve Buelow or Ameristaff.

JUDGE HARMATZ: Okay, go ahead. Sorry. —

BY MS. BRAMMER:

Q You did not instruct Ameristaff to terminate Mick Hansen because he didn't have safety shoes, did you?

A No, that wasn't the reason.

Q And the hard hat was not a reason, isn't that right?

A No, they were mentioned but they were not the reason.

Q And those were also not the reason that you decided not to take him on Town and Country's payroll, were they?

A That is correct.

Q The real reason was because Mick Hansen was affecting the morale of the employees on that job, wasn't it?

A No, that was part of it.

Q That was a big part of it?

A No.

Q So the fact that Reinders was angry and Grow was threatening to leave did not enter into your conversation—

A Yes, that—

[394] Q —very largely?

A —was a factor, yes.

Q And the other factor was how Mick Hansen handed up materials?

A No, it was his productivity.

Q Okay, tell me again what the productivity problems were. Your testimony was—first of all let me ask, you testified that you were vague on what the productivity problems were, is that correct?

A Yes.

Q Okay, so tell me again your vague recollection of what the productivity problems were?

A I was made aware on Tuesday from Rod Smithback late, that Malcolm Hansen's productivity wasn't up to par, wasn't up to our standards and that—I mentioned to him that he would have to talk it over with Dennis Defferding, I don't want to get into that part of it, that was a decision that Dennis and he had to make and he mentioned something about handing up a stick of conduit or something or walking around or—I forgot all of the types of things that were involved.

Q You wouldn't—a stick of conduit wouldn't be handed up until the person that was up needed it, would it?

A I don't know if it required a bend or not.

Q Okay.

A See, I wasn't on the job site and 9 out of 10 times, that [395] would never happen.

Q So based on these vague reports that Hansen was not up to par, you called Ameristaff and instructed them to terminate Mr. Hansen, is that correct?

A No, that is not.

Q What were the other basis, you were deciding to terminate him?

A The decision to terminate Malcolm Hansen came from the project manager and the project supervisor or superintendent, excuse me, and whatever they decided at that juncture I said was a factor, either they make a decision based on everything that they've evaluated Malcolm on because I would have to go to the company's president on the other related issues.

Q And to the extent you spoke with Smithback and Defferding about those perceived problems, Hansen's effect on the morale of the employees was a topic, wasn't it?

A Yes, it was.

Q Okay. You testified that you directed, I think it was Mr. Smithback to tell Hansen that he was being

terminated after work because you didn't want him running through the mill.

On that job site, there wasn't any prohibition on employees break time as far as where they could be, was there?

A I am not familiar with all of the rules of the breaks. I only go by what they reported to me.

[401] A If they volunteer the information, I don't ask that specific question. The mere fact that they come in and they want to look at an application, let's say an applicant files a grievance with the State Job Service, the Equal Rights Division. They are going to come in and ask for any documentation that I have and I can pull that out of the file and document what they have, if I have an application in front of me. That's what I mean by logging that information.

I don't log information in on telephone calls. They only think I do that, is if we send out applications.

Q Do you know what percentage of your employees are in the union?

A Are or were?

Q Either one, let's say both.

A Combination, I'd say 40, 41, 42 percent.

Q How do you know that?

A Well they've identified that. We have letters from people that they've gotten or statements from the people that we've hired, that they have gotten letters in mail that they are going to be fined or that now that they are no longer a part of the union, they are working for non union, they have to appear before before a committee of some sort and then they bring that to our attention.

MS. BRAMMER: Nothing else.

JUDGE HARMATZ: I just want to jump in for one thing.

[466] JUDGE HARMATZ: Did I receive 1 and 2?

MR. GORDON: I believe you did.

JUDGE HARMATZ: Okay. All right.

We will continue with defense.

MR. PEASE: Your Honor, there were a couple of housekeeping matters that I hoped to take care of by stipulation. It appears it would be more appropriate to call witnesses, I have two very, very short witnesses, Mr. Slipy and Mr. Priem. Mr. Slipy has to be gone tomorrow and I am going to put him in at this stage, just for convenience. Whereupon,

JOHN J. SLIPY

having been first duly sworn, was called as a witness herein and was examined and testified as follows:

DIRECT EXAMINATION

BY PEASE:

Q Please state your name for the record and spell your last name?

A John J. Slipy, Junior. S-L-I-P-Y.

Q By whom are you employed?

A IBEW Local Union 343.

Q And what's your position?

A I'm the business manager.

Q How long have you held that position?

A Since July 2nd, 1986.

[467] Q And what are your duties and responsibilities in that position?

A I do the administrative work for Local 343. I oversee all of the policies and procedures set forth by both the IBEW and the local union itself.

Q Isn't it true that during the month of September 1989, that Mr. Roger Kolling was employed by the local as a business representative?

A Yes sir.

Q And what was his—was he paid by a salary?

A Yes sir.

Q And what was his salary at that time?

A His salary is based on 44 hours of foreman's wages per our agreement, plus the benefits. But his wages, is that simply what you want?

Q And then fringe benefits on top of that?

A Yes.

Q Directing your attention to September 7th, 1989, did you receive a telephone call from Mr. Mike Priem?

A I would say yes, only because I've heard the testimony, sir, but I did receive a phone call from Mike Priem relating to this case, yes.

Q Okay—

A I could not tell you was—it was September 7th, other than this—

[468] Q But you do recall receiving a call?

A Yes sir.

Q And who is Mike Priem?

A Priem is a business representative with Local 292, IBEW.

Q And did you know that at the time you received the call?

A Yes sir.

Q And about what time of day was it, do you recall?

A It was very early morning is all I remember because I had just gotten there, you know.

Q What time you you normally get to work?

A I normally get there between seven and seven-thirty, but that particular day I remember as I was walking in, they told me and I can't remember why I was late. They

told me Mike was on the phone, so it was very early.

Q What was that conversation?

A Well Mike told me that one of our members was in the hiring hall of Local 292 and was—wanted to go over to the Embassy Suites with them and apply for work with someone who had an ad in the paper, that's really all I knew about it and whether I would have a problem with it and I said, "well if he doesn't have a problem with it, we would not".

As long as he was doing it voluntarily and not being somehow coerced.

MR. PEASE: I have nothing further of this witness as this time.

[469] JUDGE HARMATZ: Any questions?

MS. BRAMMER: No.

MR. GORDON: No.

JUDGE HARMATZ: Thank you Mr. Slipy.

THE WITNESS: I would ask, am I totally released?

MR. PEASE: Yes.

THE WITNESS: Thank you.

(Whereupon, the witness was excused.)

MR. PEASE: I appreciate it.

Whereupon,

MICHAEL PRIEM

having been previously duly sworn, was recalled as a witness herein and was examined and testified as follows:

DIRECT EXAMINATION

BY MR. PEASE:

Q Are you familiar with the rate of compensation paid to Business Representative Gary Shafranski?

A We don't have a business representative Gary Shafranski. Greg Shafranski.

Q I apologize. I take that back, Greg Shafranski.

A Yes, I am.

Q Is his pay the same as yours?

A Yes.

Q And what is that?

A We get foremen's rate based upon 48 straight time hours [470] per week.

Q And fringe benefits in addition to that?

A Right.

Q And that was true during the month of September, 1989?

A Right.

Q Directing your attention to the period of time, to the week — I'm sorry, directing your attention to September 11, 12, 13, and 14, 1989, isn't it true that you received at least three telephone conversations from Malcolm Hansen, during that period of time?

A I would say yes.

Q And isn't it true that all of these conversations concerned his organizational activities at the Boise Cascade site?

A Yes.

Q Do you recall, when during the day those conversations occurred?

A Yes, I was woke up by the telephone early in the morning, I believe one morning, it was — I would guess between six and six-thirty in the morning maybe, approximately, or they would be in the evening sometimes, after 6:00 sometime.

MR. PEASE: No further questions of this witness at this time.

MS. BRAMMER: Nothing.

MR. GORDON: Nothing.

[495] told the Board Agent, there were no documents, that you trusted Mr. Smithback's judgement? Do you recall saying that?

A Yes.

Q And it's your testimony today that you received these foremen diaries on about September 15th?

A Right.

I believe what I said to —

Q There's no question pending.

Thank you. When Mr. Smithback called you on Wednesday, September 13th from the Boise job site, and complained to you about Mr. Hansen's productivity, that you testified that you said he wasn't helping and you said that he was often missing from the work area, do you recall that?

A Yes.

Q Did he say anything else in the nature of a complaint about Mr. Hansen?

A He said he was disrupting the crew.

Q Had he mentioned that at lunchtime that day, Mr. Hansen had announced that he was there to organize?

A Yes, I believe he did.

Q And that was offered as an example of his disruptiveness, wasn't it?

A No, his disruption was during working hours.

Q What did he give an an example of the way in which Mr. Hansen was creating disharmony among the work crew?

[496] A Where he would rather talk than produce work.

Q And how was that creating disharmony?

A Well, it's hard to talk and work at the sametime [sic] —

Q That's what Mr. Smithback told you?

A No, I'm very well aware of what it takes for installation and talking and working—there can't be constant talking—

Q Just what did Mr. Smithback tell you, if anything, in the way of illustrating what was creating disharmony on the work crew?

A There was a constant talking to the people when they would rather be working.

Q So, he did tell you that?

A Yes.

Q But you didn't ask what he was talking about?

A No.

Q And it wasn't offered to you?

A Well—

Q By Mr. Smithback?

A No.

Q Do you recall telling the Board Agent during the investigation that in early September, Town and Country anticipated a need for 15 to 30 electricians on that job?

A Yes.

Q Okay. Now one licensed electrician plus two unlicensed electricians with clearance letters from the state would not [497] be able to support 12 to 27 electricians, would they?

A That's correct.

MS. BRAMMER: Nothing else.

CROSS-EXAMINATION

BY MR. GORDON:

Q Going to the meeting—interviews on September 7th, you stated in your testimony that when you called Mr. Hansen in for the second time that you asked him if he was still interested in the job?

A That's correct.

Q And you explained that—you asked him that because it looked like he was getting a hard time?

A Yes.

Q What was it that you saw or heard, that caused you to—

A I just saw him—

Q Let me finish. That caused you to believe that he was getting a hard time?

A I was—saw him talking to one of the people that he said was one of his union buddies.

Q Okay.

A And I said, "are they giving you a hard time because you're interested in working for us".

Q How did you know it was one of his union buddies?

A He had mentioned it.

Q Do you recall a meeting at the Arrowhead Lodge on or [498] about September 10th or 11th?

A Which meeting?

Q A meeting—a safety meeting?

A Yes.

Q And do you recall during that meeting, Mickey Hansen told you that he did not yet have steel toed shoes?

A Correct.

Q And do you recall telling him that he should go out and buy them or he could go out and buy them?

A He should go out and buy them, yes.

Q And did you tell him that Smithback would go with him or take him?

A No, I never said that.

Q Did you ever receive any written complaints from Boise with respect to Mickey Hansen's work performance?

A From Boise Cascade itself?

Q Yes.

A No.

Q Did you receive any written complaints from Boise with respect to the performance of Town and Country during the time period that Mr. Hansen worked for you?

A No.

Q And you never saw Mickey Hansen personally, you never personally saw Mickey Hansen perform any work at the Boise facility, did you?

[504] that you had on your job, to maintain your job, at that meeting?

Was it offered by BE & K?

THE WITNESS: They made a general offer on anything that we can help you with, let us know because you're the new kid on the block, so to speak, that type of relationship.

JUDGE HARMATZ: When was your next meeting with anybody from BE & K?

THE WITNESS: It was in a phone conversation.

JUDGE HARMATZ: What was that date?

THE WITNESS: Thursday, the 14th.

JUDGE HARMATZ: And what was the content of that conversation?

THE WITNESS: I informed them that we were to be releasing through Ameristaff one of our people, one of our licensed people or our license person and that we would be requiring for a short term basis because we had some other people coming on, that we would need somebody to—with a license.

JUDGE HARMATZ: And what was their response?

THE WITNESS: They gave us a person.

JUDGE HARMATZ: Effective when?

THE WITNESS: Effective, Friday the 15th.

JUDGE HARMATZ: BE & K was operating non union, right?

THE WITNESS: That's correct.

[505] JUDGE HARMATZ: And was he to be employed on your payroll?

THE WITNESS: Yes.

JUDGE HARMATZ: Permanently?

THE WITNESS: Yes.

JUDGE HARMATZ: Did he complete an application?

THE WITNESS: Yes. I saw one—Ron Sager would have to verify that, I believe he did fill out an application.

JUDGE HARMATZ: Now who did you talk to from BE & K concerning this gentlemen [sic]?

THE WITNESS: Gary Martin.

JUDGE HARMATZ: And—we're talking about Mr. Ensign, right?

THE WITNESS: That's correct.

JUDGE HARMATZ: And what did Mr. Martin tell you about Mr. Ensign's present employment status?

THE WITNESS: He said—you mean as far as—well he was employed by them and was working for them.

JUDGE HARMATZ: In other words he just switched payrolls? He switched from their payroll to your payroll?

THE WITNESS: That's correct.

JUDGE HARMATZ: Okay. Was he hired sight unseen, solely on the basis of Gary Martin's recommendation?

THE WITNESS: Yes. And his application which again, I believe we have an application.

[506] JUDGE HARMATZ: When did he start work for you?

THE WITNESS: On Friday, the 15th. I believe—again, I would have to check our payroll records.

JUDGE HARMATZ: That's your best recollection?

THE WITNESS: That's my best recollection.

JUDGE HARMATZ: Your best recollection is nobody was sent home in consequence of the termination of Mr. Hansen?

THE WITNESS: Right.

JUDGE HARMATZ: No one this time, I should say?

THE WITNESS: That's right, yes.

JUDGE HARMATZ: And unless you were working illegally, that would only have occurred if Mr. Ensign started on Friday?

In other words, if Mr. Ensign hadn't started on Friday, some of your people would have had to miss work—

THE WITNESS: Right—

JUDGE HARMATZ: —or you would have been functioning illegally?

THE WITNESS: Yes, yes.

JUDGE HARMATZ: All right.

Anything further?

MR. PEASE: I have nothing further.

BY MS. BRAMMER:

Q Just to clarify, BE & K was not the general who contracted with you on that work, is that correct?

A On which work?

[533] Q They did not get done?

A They did not get done. The home run was for all intent and practical purposes practically a straight pipe and it was—should have been farther along than it was.

Q Did you make any inquiries into that?

A No, I didn't have to, both Tom Steiner and Randy Reinders came up to me and asked me specifically if I could find something for Mick to do, so that they could get some work done. He was interrupting them, consistently talking, would not allow them to proceed in the fashion to which they were accustomed to working.

Inasmuch as they set up a scaffold, placed pipe on it and then were about to take the clamps to the top of the scaffold with them, set them on a platform up higher and then

proceed down the room to run the conduit and Mick would not allow them to take the clamps up because then he would have nothing to do, he couldn't throw the clamps up to them.

So he took essentially a two man job and made it into a three man job and in the process—they complained about he talked an awful lot.

Q Did you have any opportunity to observe Mr. Hansen's work performance on Wednesday, September 13th?

A Yeah, the other electricians up there complained about—boy, was it Tuesday or was it Wednesday, that he was rough with the hand tools, the portable hand tools, the power tools [534] that we had.

Yeah, as a matter of fact it was Tuesday, he went through, we have what is called a porta-bandsaw, it is used for cutting metal, a electric hacksaw and it has a blade on it that is round—it's circular and it has teeth on it and through the process of one day, he went through five blades, busted them off by improper use of the porta-band, rocking it, trying to—banging it and what not.

He took the points off most of the drill bits that we had on site by—we had to drill the strut that he was cutting because it had no holes in it, to mount it with and they said he literally attacked the metal with the drill, high speed and—

MS. BRAMMER: Objection, I mean if—what—if what was said is going to be let in, could we at least have who is saying it rather than "they said"?

JUDGE HARMATZ: Yes, you have to identify.

THE WITNESS: Okay.

BY MR. PEASE:

Q Just tell us who said—

A Tom Steiner related to me that he was breaking porta-band blades at an alarming rate, what would nor-

mally last for two or three days, he—a blade should last at least a week and he had gone through five or six blades in one day.

The drill bits both Randy and Tom made comments about [535] that, I believe, I'm sure, yeah, they both made comments about the drill bits. He had chipped the edges on all the drill bits that we had at the mill.

On Wednesday I believe he got around to running some conduit and I noted myself that he used a hammer on the pipe by—the rigid 300 mule, which is strictly a hand type device—it's a rigid 300 machine and it's—there's no need to pound on it to get the pipe clamped into it, everything can be done by hand. I noted that he was taking a hammer to it and beating it tight which is not a good practice.

Throughout the day on Wednesday I did notice that he was speaking with people an extraordinary large amount of time. He tended to have coffee with the crew and then coffee with the mill crew and he would talk to the guys and in his way of talking his personality would be forceful enough, he would more or less make it hard to work while he was talking to you.

Q Did the mills and Town and Country take their coffee breaks at the same time or did they?

A Approximately, the mill personnel in the welding shop had coffee on constantly and they would—they were usually—they were close together but they usually took theirs slightly after us.

Where am I, I must be on Wednesday yet?

Q You're on Wednesday, saying that he was talking and made it somewhat difficult for the employees to work.

[536] A The rest of the guys were upset with the amount of productivity they had gotten done too, meaning Randy and Tom at this point, because Mike was not present. They were both upset, saying "Man, we should have been farther than this, we just can't get anything

done. Everything Mick cuts he cuts crooked". They had to recut, rebend, redo, most everything he had done and—okay, he was talking Wednesday morning when I came in and Randy Reinders I believe asked me a question about something, how we were going to do it and we were standing over on one end of the room and discussing what was to be done in that room and the mill personnel was standing five or ten feet away from us, the guy who ran the welding shop and Mick came storming up and yelled at me and said "I thought we made it perfectly clear that I'm in charge of this group and that if you want to talk to anybody who's working, Randy or Tom, I had to talk through Mick", I could not talk directly to the guys on the crew.

Q That sounds as though that was referring to a previous conversation, something that happened before that?

A Well I assume, I don't know where he—you know, he had made it clear that without him there, we weren't going to be there and he had made that clear on Tuesday already. He had talked to Ron about that.

Q Had he previously made any statements to the effect that you couldn't talk to the employees?

[544] A Immediately, when I requested it Tuesday.

Q Do you recall a conversation, having a conversation with Mr. Oslin the inspector on Wednesday, the 13th?

A Right now, I guess I don't.

Q Do you recall any conversation with Mr. Hansen in which you talked to him about his talking?

A Yes.

Q Was there more than one conversation on that subject?

A Well, Wednesday morning, I had the conversation with him after he come to a—he had revealed at that

point, Wednesday morning he came to me and said, "I'm a union organizer" and in the sam [sic] statement he said, "The way I organize is to be up front and honest". At that point, I kinda walked away, I really didn't want to talk to him at all, until I talked to the main office.

I called the main office and asked them — told them the news and asked them, okay, what's going to happen here and at that point they said, "there's not a lot you can do". They asked if he was working steady and I said, "no, he talks a lot". They said, "about the the only thing you can do is ask him to talk less and work more".

And they made the statement you know he can talk about anything he wants to on breaks anything, as long as it doesn't interfere with the work.

At that point, I went up and told Mick that, in essence [545] what I said was, please talk less and do more work. I may have said something Thursday to the same effect but it was.

Q Do you recall either Tuesday, Wednesday or Thursday, either one of those days having any conversation with Mr. Hansen in which he said anything to the effect that he couldn't talk union or talk about unions?

A I never had a conversation where I said that. He came at me and asked me, who in the mill said you couldn't talk union on the mill property. And I was just kind of — Oh, wait a minute, I don't know where you're coming from, that was never said. And I said, "that was not at all what we were talking about".

Q When did that conversation take place that you just described?

A Thursday morning, instead of riding in with the rest of the crew, Mick brought his car into Country Kitchen and we picked him up there and brought him into the mill and he rode with me alone and that's where he asked me

about that. We were just about at the mill when that happened. We went around the corner and I was getting ready to drive into the mill through the gate that we were supposed to use and he said, "oh wait a minute I've got to talk to somebody, I want to get out and talk to the pickets" and before I could even stop the truck, which I was trying to do, he had the door open and had jumped out and went and talked to the pickets.

[549] accepting him for testing for the journeyman's A license in the State of Minnesota, which allows him to work.

Let's see, when I got there they were all sitting around and talking already and when I pulled up, sat down they were — Mick was talking about union.

Earlier in that day Randy had complained about Mick, harping on him about the union, Tom had also complained about Mick constantly on him about the union, playing games with him back and forth between the two of them, they said that he would go to one of them and say, "Yeah, Tom's just about ready to sign, don't you want to sign up with him?", then he'd go back to Randy and say the same thing to him and they both knew how to talk to each other and knew it wasn't true, they'd never much thought about signing with the union.

We sat down for — I got there, they were sitting down and Mick was talking about the union, I was quiet, don't want to force a confrontation, Randy had threatened to leave that morning, he says, "I'm having a real hard time with this Rod," he says, "I'm really upset, I'm really tense, I've been through this before, I don't like this, what's going on. He was visibly upset.

By that time, Mr. Grow was shaking, almost all the time, very nervous. They were talking about — Mick was

talking about union stuff and Mike got upset with him and said, "what would it take to get you to drop the union and to come over to

[553] your knowledge supported — indicated that they were favorably inclined towards what Tom was asking?

THE WITNESS: Pardon?

JUDGE HARMATZ: It is your testimony that nobody in that group was interested in joining the union?

THE WITNESS: Correct.

JUDGE HARMATZ: All of them, whenever you were around indicated the opposite, that they were disinterested in the union, the same as you are?

THE WITNESS: Correct.

JUDGE HARMATZ: Okay, that's all. You may continue.

THE WITNESS: Mr. Hansen, even after they asked him to stop discussing it with them, still constantly brought it up.

After he so to speak came out and told us that he was a union organizer or he came out and informed us of that, later on in the cabin one of the guys asked him about the violence last Saturday and he said, "well no, we had nothing to do with that at all". And then he said, "well, I'm speaking with respect to the local that I belong to". He says, "I can't really speak for the people up here".

Q What if anything did Mick do or say that might have aggravated or did aggravate the concerns of the crew?

A Mostly, wouldn't respect their right not to even talk about it, they weren't interested and he just continually talked about it, disrupted them, disrupted their work —

[554] JUDGE HARMATZ: Excuse me, you said that he did not respect their right not to be talked about concerning the union, is that what you're saying?

THE WITNESS: I am gray in that area myself, I don't know, do I have the right not —

JUDGE HARMATZ: What you know is totally irrelevant, what your understanding of the requirements are, I'm concerned what you, yourself know. This is not the point —

THE WITNESS: Okay.

JUDGE HARMATZ: —in which you are to be instructed as to what your obligations are and what the rights of others are, you used the term that the employees on that job site, were having a right interfered with by Mr. Hansen who was constantly asking—talking to them about the union.

Now when you used that term, "their right", did you mean their right not to be talked to about the union?

THE WITNESS: Their right not to be talked to if they didn't want to be —

JUDGE HARMATZ: About the union.

THE WITNESS: —about the union.

JUDGE HARMATZ: It could be any subject, but in this case it happened to be the union?

THE WITNESS: Yes.

JUDGE HARMATZ: Now, you felt that they had that right and they may have it, I don't know, but you felt that they had

[558] shifted and that was the end of it.

JUDGE HARMATZ: Did everything calm down then?

THE WITNESS: No, Randy left the table and went and called his wife for about 20 minutes. He came back and said, "Rod that's it, if this thing is not settled today, I'm going home tonight".

JUDGE HARMATZ: And when was this now?

THE WITNESS: Thursday at lunch.

BY MR. PEASE:

Q Mike is an employee or was an employee on the job, was he not?

A Yes.

Q Did you make any statements to Mr. Hansen at anytime about jumping ship or coming over to our side or anything?

A No.

JUDGE HARMATZ: Excuse me a minute, did you discuss this incident with Mr. Defferding, this lunch time on Thursday incident?

THE WITNESS: Yes.

JUDGE HARMATZ: Did you tell him the scenario that you described to us, did you tell him that people were upset?

THE WITNESS: Yeah, I told him people were upset.

JUDGE HARMATZ: Did you tell him why?

THE WITNESS: Yeah, I told him Randy was ready to fight or run.

[559] JUDGE HARMATZ: And let me just go over that one more time for emphasis. The reason that these people were upset is because Mr. Hansen was constantly pushing the union on them?

THE WITNESS: Correct.

JUDGE HARMATZ: And you reported that to Mr. Defferding?

THE WITNESS: Denny, yes.

JUDGE HARMATZ: And you couldn't be mistaken about that?

THE WITNESS: No.

JUDGE HARMATZ: Okay, you may continue.

BY MR. PEASE:

Q Did you recall on the morning of Thursday, September 14th having any conversation with Mr. Hansen about his productivity?

A That one was not stated by me, that was stated by him. He had talked to Ron I believe and Mick was upset, visibly upset. He had talked to Ron about it and Ron had told him why. He came back at me and point blank said, "you're lying about me, I want you to call Ron right now and straighten this thing out" and I said, "Now Mick, I have nothing to straighten out, this is what is happening, if you want to talk to Ron, you're welcome to talk to Ron".

Q Did he say what he thought you were lying about?

A Productivity. He said that he was responsible for everything that had been done on the job so far and without him there nothing would have been done so far.

[562] Q All right, going back to the work that started on October 1st.

A Yes.

Q Okay, who was the contracting entity with Town and Country in that work?

A Boise Cascade.

Q Okay and that work is the work that you said some of the Town and Country electricians went to?

A Right, correct.

Q Now any issues that may have arisen regarding safety shoes and hard hats were not part of your recommendation to terminate Malcolm Hansen?

A No.

Q Is that correct?

A Correct, sorry.

Q Do you have with you today any more of these foremen diaries?

A No.

Q You testified that you are supposed to fill these out everyday, I take it that you don't always do that?

A I am better at it than a lot of the other foremen.

Q You don't always do it?

A I don't always do it, no. Being as this was a start up of a new contract, I was more cautious and made sure I filled them out daily.

[566] arrive.

JUDGE HARMATZ: Is that the only delivery that it could have possibly come in that day to your knowledge?

THE WITNESS: I was informed that it was supposed to be there in the morning.

JUDGE HARMATZ: And so you're saying that you could have made that entry in the morning?

THE WITNESS: I may have.

JUDGE HARMATZ: Did you?

(Pause)

THE WITNESS: I would say probably not because I did have him go into town to see if he could pick up some nuts and bolts. But you see, I'd already put the other part on there about—they didn't have the right size screw.

JUDGE HARMATZ: So when do you think you completed the document?

(Pause)

JUDGE HARMATZ: If you don't know, you don't know.

THE WITNESS: I really can't say.

JUDGE HARMATZ: You don't know.

THE WITNESS: Other than it was done on the 13th.

BY MS. BRAMMER:

Q And you did not mention in any of these foremen diaries any of the allegations of—for example tool abuse that you testified to, did you?

[567] A No, I did not.

Q Or the crooked cutting?

A No, I did not from the looks of it.

Q Talk—you mention talking and you mention the crews spirit, is that correct?

You mentioned what is included in the comments boxes, is that correct?

A Uh-huh.

JUDGE HARMATZ: I'm just wondering if you have ever criticized an employee other than Mr. Hansen and other than this gentleman who is on workman's compensation in one of those documents? Have you?

MR. PEASE: With respect to the Boise Cascade site, or—

JUDGE HARMATZ: Anywhere.

THE WITNESS: Yes, I have.

JUDGE HARMATZ: Have you included those criticisms in the body of the report?

THE WITNESS: No, usually not, I, myself consider that a comment what I feel, that's why I put them down there.

JUDGE HARMATZ: How about somebody who has bad productivity, who is disrupting production?

Do you still use the comments box customarily?

THE WITNESS: When—customarily yes, when I talk about someone directly, some—in respect to what I think they are doing or not doing, I would put it in the comment box.

[570] BY MS. BRAMMER:

Q You testified that Tom Steiner and Randy Reinders complained about Mr. Hansen talking, do you recall that?

A Yes.

Q Do you recall what he complained he was talking about?

A They complained he was riding them heavily about joining the union.

Q They didn't complain about the rate he was throwing clamps up for example, did they?

A Yes, they did as a matter of fact, because he left and they had to come down and get the clamps by themselves.

Q So they complained not about the rate at which he was throwing clamps up, but in fact —

A No ma'am. As he was proceeding along, as they needed a clamp, he would throw one up.

Q Okay. Did that make Mike Grow shake that he wasn't throwing the clamps up?

A Mike Grow wasn't in the same room.

Q Did you ever approach Mr. Hansen and talk to him about your perception that he was going through a lot of porta-bandsaw blades?

A No, I was told to back off on Mr. Hansen, because of the licensing problem.

Q You never confronted him with your perception that that was a problem, or that that was even happening?

[571] A No, I did not directly.

Q Did you direct anyone else to?

A I did not direct anyone else to either.

Q Did you ever approach Mr. Hansen about the fact that he was doing some cutting work in a crooked manner, that you thought he was doing in a crooked manner?

A No, I did not.

Q You never approached him about any of these alleged production problems, did you?

A No ma'am. Other than the fact that he talked —

Q He talked too much, you approached him about that?

A Too much talk and not enough work.

Q Quite often, you approached him about —

A A couple of times.

Q —that.

How much time was left on the break on September 13th when you told Mr. Hansen to talk about something else?

A No ma'am, I did not tell Mr. Hansen to talk about something else. I was referring to —

Q Okay, you told him to talk about fishing or something.

A I did not tell Mr. Hansen to talk about fishing. I said, "hold it guys, before you answer that question, I would really rather you talk about something else like fishing or something".

Q Okay, pardon me for that mischaracterization.

[572] When you said that, how much time was left in the break?

A Five or ten minutes.

Q Okay, so when Randy Reinders called his wife for 20 minutes he was doing that on work time, wasn't he?

A Not for 10 minutes, no.

Q Ten minutes of it was work time?

A Probably.

Q You never received any complaints from anyone from Boise Cascade about Mr. Hansen's work on this job, did you?

A No. May I answer further.

Q No, that's responsive.

A All right.

Q You testified that on September 15th, were was a buoying of spirits on the job, do you recall that?

A Friday?

Q Yes.

A Yes.

Q Okay and that was because the licensed electrician from BE & K was there instead of Mr. Hansen, is that correct?

A We had hired another licensed electrician, yes.

Q Mr. Ensign?

A Mr. Ensign, Frederick Ensign, yes.

Q How is his last name spelled?

A E-N-S-I-G-N, I believe.

Q From your testimony it sounds like Gary, is it Gary
[573] Steiner?

A Tom.

Q Gary Steiner and Randy Reinders were pretty shaken up, is that correct?

A Randy was very shaken up. Tom was upset.

Q And Mike Grow was shaking?

A Shaking, yes.

Q And I imagine that interfered with productivity earlier that week, didn't it?

A I would imagine so.

Q Why would Hansen ask Grow a employee of Town and Country, what Town and Country would offer him for jumping ship?

A I have no idea.

Q Does it make sense to you?

A Mike had made the comment, I was present and I imagine he was addressing all of us.

Q I don't understand that, "He was addressing all of us". Who was addressing all of you?

A Mick.

Q Was it your testimony that you actually saw a union authorization card?

A Me?

Q Yes.

A I did not. I did not look, I—

BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION EIGHTEEN

In the Matter of:

Case No. 18-CA-11035

TOWN & COUNTRY ELECTRIC, INC., AND
AMERISTAFF PERSONNEL CONTRACTORS, LTD., RESPONDENT,
and

CHARLES EVANS, AN INDIVIDUAL, CHARGING PARTY.

Case No. 18-CA-11044

TOWN & COUNTRY ELECTRIC, INC., AND
AMERISTAFF PERSONNEL CONTRACTORS, LTD., RESPONDENT,
and

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS,
LOCAL 292, AFL-CIO, CHARGING PARTY.

Case No. 18-CA-11080

TOWN & COUNTRY ELECTRIC, INC., AND
AMERISTAFF PERSONNEL CONTRACTORS, LTD., RESPONDENT,
and

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS,
LOCAL 343, AFL-CIO, CHARGING PARTY.

Thursday, December 14, 1989

[601] Room 471
Federal Building
110 South 4th Street
Minneapolis, Minnesota

The above-entitled matter came duly on for hearing pursuant to notice, at 8:20 a.m.

BEFORE: THE HONORABLE JOEL A. HARMATZ
Administrative Law Judge

APPEARANCES:

*On behalf of the General Counsel
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[618] A I saw him drilling holes, yes.

Q What if anything was your reaction to the performance of that work?

A He measured them out right and everything like that. I found out later that he was burning up the drill bits.

Q What if any other work, if you can recall, performed on Tuesday?

A I think that's probably about it.

Q What about Wednesday, what work was performed on Wednesday?

A Well, we started putting strut up first and all the rest of the welding connects and Randy was working on some starters and stuff like that. Malcolm was between the both of us, he didn't get a hold lot done that.

Q Would you please explain what you mean?

A Malcolm was between Randy and I, talking to us about the union and whatever. He would come up with something, either a joke or something that happened or whatever and then work that into telling us about the union. He was drawing up these little pies a lot of times, and stuff like that.

And he would say, "you get a piece of this pie" or you get this piece and this piece, but if you work for the union you can get this much more.

Q What did that have to do with how much work you got done that day?

[619] A I wouldn't say anything.

Q Pardon?

A I mean, he was telling us these things and we weren't doing what we were supposed to be doing. We weren't doing our work, we were listening to what he was saying.

Q Why did you listen to what he said?

A Well, we needed his help in some things and if — we were talking, we were irritated at this time and we just wanted to get going, do something, you know.

Q Why didn't you?

A He was just pushing the fact that we should talk about this.

Q Did you anyone from the company?

A I was telling Rod, yes.

Q Did you talk to him on Tuesday?

A ON?

Q Rod on Tuesday?

A On Tuesday, yeah.

Q What did you tell Rod?

A I told him about the bandsaw and various things that he was talking about the union and stuff.

JUDGE HARMATZ: Did you tell about the bending of pipe with the dog legs?

THE WITNESS: Yeah, I told him about that.

JUDGE HARMATZ: You told him that on Tuesday?

[620] THE WITNESS: Right.

JUDGE HARMATZ: And did you tell him about the improper cut.

THE WITNESS: I think Randy and I both told him.

JUDGE HARMATZ: On Tuesday, right?

THE WITNESS: Right.

JUDGE HARMATZ: Did you tell him about his asking you a stupid question about whether the conduit was to be layed end to end?

MR. PEASE: Back to back, measured back to back.

JUDGE HARMATZ: Back to back, I mean?

THE WITNESS: Yeah.

JUDGE HARMATZ: You told him that too on Tuesday?

THE WITNESS: Right.

JUDGE HARMATZ: And did you tell him about the breaking — the improper use of —

THE WITNESS: Bandsaw.

JUDGE HARMATZ: Yes.

THE WITNESS: Yeah, we might have told him that, we might have told him that on Wednesday or something too.

JUDGE HARMATZ: Wednesday, when?

THE WITNESS: Probably in the morning I would say.

JUDGE HARMATZ: Did you tell him about the breaking of the drill bits on Tuesday?

THE WITNESS: Randy had told him some of that stuff, I [621] wasn't really watching Malcolm that much drilling, I just —

JUDGE HARMATZ: Do you have personal knowledge that he was told that?

THE WITNESS: What's that?

JUDGE HARMATZ: Do you have first hand knowledge that MR. [sic] Reinders told him?

MR. PEASE: Reinders.

JUDGE HARMATZ: Reinders told him?

THE WITNESS: Uhm —

JUDGE HARMATZ: That on Tuesday.

THE WITNESS: Yeah, but he told him that on Wednesday about the drilling.

JUDGE HARMATZ: And did you tell Mr. Smithback about the failure to cut to proper lengths, the pipe on Tuesday?

MR. PEASE: I believe it was the —

THE WITNESS: The struts.

JUDGE HARMATZ: Struts, is that what it was?

THE WITNESS: Right.

JUDGE HARMATZ: Did you tell him that?

THE WITNESS: Right.

JUDGE HARMATZ: Okay, now you may continue.

BY MR. PEASE:

Q What other work was performed on Wednesday.

A Well we — I think we got up some of the disconnects, welding disconnects and Randy — yeah he got up the starters, [622] we had some three motor starts that day, had their first — installed.

Q Any other work on Wednesday?

A Not really. Really didn't do a whole lot on Wednesday. We had — I think we had done some of the conduit inside the welding shop, the main run coming in on Wednesday also.

Q Was any work on nipples done on Wednesday?

A No that was done on Thursday.

Q How did you describe Malcolm's work performance on Wednesday?

A He wasn't there most of the time on Wednesday, I wouldn't say most of the time, but he wasn't there a lot of times, he was either going to the bathroom — in fact one time Randy went to the bathroom and came back and I had to ask him if he had seen Malcolm and he said "no". And then we were waiting and waiting for him to come back and then he came back and I guess he was talking to somebody from Fagen or something like that.

Q Whose Fagen?

A Fagen is another non union contractor.

Q Do you have any idea what else Mr. Hansen was doing while he was away from the work station?

A I have no idea, I mean I wasn't out there with him or whatever, where ever he was.

Q Was there — can you think of any particular situations [623] in which you needed his assistance?

A He was across the room a couple of times, talking to — I can't remember his name. There's two guys who are running the welding shop up there.

Q These are people who are employed by the mill?

A Yeah, they're Boise Cascade employees.

Q And he was talking to them?

A Yeah, and I had called him over and he was just—wait a minute you know, I'm either in a middle of a sentence or something, I don't know, just waited, so then I would wait and eventually he'd come over after I had called him a couple of times.

Q What were you calling him to do?

A Probably hand me some conduit or help me with holding unto a box or something like, something where you would need more than just two hands.

Q Was this during break time, your break time?

A No. While we were working.

Q Okay, let's go to Thursday, what work do you recall being performed on Thursday?

A I was doing some stuff with an inch and a half run or whatever like that and Malcolm was working on them disconnects and stuff. He gotten pretty much all of them hung and stuff like that and then he was making nipples stuff like that, and we were helping back and forth with an inch and a

[629] A Yeah, the have to be the same length because if they are not, then they're not going to meet the trough.

Q Do you recall any conversation that you overheard between Rod Smithback and Malcolm Hansen relating to Malcolm's talking?

A He told him that—

Q Who told whom?

A Rod had said to Malcolm that he should start working instead of talking.

Q Anything else that you heard?

A Told him that a couple of times.

Q Do you remember when?

A That was on Wednesday and Thursday.

Q Do you recall anything else that he said to him at the time that he made those statements?

A No, just a little less work and more talking.

Q Less work and more talk?

A Or, more work and less talk, excuse me.

Q Do you recall him saying anything about not talking about the union?

A No, he just said that he shouldn't be talking that he should be working.

Q Do you recall Mr. Smithback saying to Mr. Hansen not engaging in organizing activity.

A Nothing like that, no.

[630] Q Do you recall hearing Mr. Smithback saying to—now I'm talking about any time during the time that you were up there.

Did you hear Mr. Smithback say to Mr. Hansen that he would be fired if he didn't stop talking about the union?

A No, Rod doesn't have any power like that.

Q Now earlier questions that I asked you about whether he talked to Mr. Hansen—Mr. Smithback talked to Mr. Hansen about not talking about the union or not organizing. Was that true for the entire period of time that you were up there?

A Yeah.

JUDGE HARMATZ: You started to say that Rod didn't have power like that.

THE WITNESS: Well, I really shouldn't say that, he doesn't have power like that, I don't know what Rod, you know, can't say that he can't fire him because I really don't know positively.

JUDGE HARMATZ: He was the only boss that you had on the job wasn't he?

THE WITNESS: Right. He can send him to another job I think or something like that, but—

JUDGE HARMATZ: Send you home can't he?

THE WITNESS: Oh, yeah.

BY MR. PEASE:

Q Do you recall Mr. Hansen saying anything during the period of time that you worked together about how much money [631] he was making?

A He had just said he was making more than what Town and Country was giving him.

Q For the work up at Boise Cascade?

A Right. I didn't know exactly what he means by making more than Town and Country was giving him, but he's making —

Q Did he tell you how much?

A No, he didn't tell me how much.

Q Was he asked?

A What?

Q Was he asked?

A I asked him, yes, what he was making.

Q What did he say?

A He just said, "leave it at this, I'm actually making more than what Town and Country is giving me".

Q Directing your attention to noon on Thursday, during the lunch period, do you recall a conversation at that time?

A Malcolm had started in with a joke, something about Alaska, I don't remember what it was anymore, then it ended up being something about the union and stuff like this and he had started out, pulling out his wallet with some cards and he had a pink slip in there and whatever looked like a license or something. It wasn't a drivers license, but it had his picture on it and stuff like that.

[638] Q He approached you to inquire about Mr. Hansen's performance —

A No.

Q —didn't he.

A No.

Q You sought him out specifically to tell him.

A I walked out in the hallway and told him.

Q What hallway?

A It really isn't a hallway, it's a long building and there was a room at the end of it which is a welding shop. We just called it a hallway because that's mainly what it was.

Q When did you do that?

A On Tuesday and Wednesday.

Q What times?

A Periodically during the day, whenever something happened. If I could go out without everybody else going out at the same time I would tell him, if he was out there.

Q So, how many times in each of those days would you estimate?

A Four or five times, maybe, I went to talk to Rod.

Q On each day?

A I would say approximately, yes.

Q How many times on those days did you get out to tell Rod something about Randy Reinders?

A I would say that I told Rod, oh on Tuesday afternoon or [639] on Wednesday and on Thursday that Randy was getting irritated with Malcolm.

Q About [sic] talking about the union?

A Right.

Q Okay. How many times did you get out and talk to Rod Smithback about Randy Reinders job performance, as an apprentice on that job?

A Not once.

Q How many times of those four or five times that you went out to see Mr. Smithback on Tuesday and Wednesday, September 12th and 13th, did those conversa-

tions also include your comments regarding Mr. Hansen's union activities?

A I might have went out there, two or three times and told him that he was talking about the union and stuff like that.

Q Approximately three of those four incidents on Tuesday, your comments also included comments about Mr. Hansen's —

A I wouldn't say included. I think that's plus, you know going out there and talking about performance and then on top of that talking about talking and stuff like that.

Q And some of your comments Mr. Smithback, were only about the union activity, weren't they?

A Just about talking.

Q Talking about the union?

A Talking about the union, yes. Talking to other people also.

[640] Q Were you instructed by Mr. Smithback to keep an eye on Mr. Hansen?

A No, I just have a tendency, I like to get my work done.

Q And as part of that tendency, you like to monitor other employees and report them to Mr. Smithback?

A Well, if I have a problem on the job with that, yeah.

Q Have you ever had any other problems on the job, like that?

A Not really.

JUDGE HARMATZ: Excuse me. I just wanted to interrupt here.

The inspector showed up, did you make some of these reports to Mr. Smithback before the inspector showed up?

THE WITNESS: Yeah.

JUDGE HARMATZ: Can you remember just what you told him before the inspector showed up about the performance of Mr. Hansen. If you can't remember, don't tell us, I'm just wondering if you can recall?

THE WITNESS: Can't recall what things happened in what order.

JUDGE HARMATZ: But there were some specific things concerning Mr. Hansen performance that were not very flattering to Mr. Hansen, that you told Mr. Smithback [sic] about before the inspectors showed up?

THE WITNESS: Right.

[654] JUDGE HARMATZ: Anything further?

MR. PEASE: I have nothing.

MS. BRAMMER: Nothing else.

MR. GORDON: Nothing else.

JUDGE HARMATZ: Thank you.

(Whereupon, the witness was excused.)

JUDGE HARMATZ: Off the record.

(Whereupon, a brief recess was taken.)

JUDGE HARMATZ: On the record.

Whereupon,

RANDY REINDERS

having been first duly sworn, was called as a witness herein and was examined and testified as follows:

JUDGE HARMATZ: Off the record.

(Off the record.)

JUDGE HARMATZ: On the record.

DIRECT EXAMINATION

BY MR. PEASE:

Q Would you please state your name and spell your last name for the record?

A My name is Randy Reinders, spelled R-E-I-N-D-E-R-S.

Q And by whom are you employed?

A Town and Country Electric.

A And what is your position?

A I'm a journeyman electrician.

[676] pipe all the way to one inch and by adjusting the handle it will come down to the desired setting you want and we could put it on three-quarter and try to lock it into that position and the teeth were wiggling all over in the head and some weren't moving at all.

Q Is that the sort of disability to the machine that would occur from putting pressure on it as Mr. Hansen had done?

A Yes, it has in the past.

Q Is there anything else that you observed about Mr. Hansen's work performance on Wednesday, the 13th?

A He sat around and talked a lot.

Q To whom?

A Members of Boise Cascade crew, there was a Everett Hall and a Dennis—I don't recall his last name, he was in charge of that, he was Everett's supervisor. He sat and had coffee with them and talked with them quite a bit during the day and other members of the mill would walk up there.

Q Did you have any idea what they were talking about?

A Yeah, being union. It was mentioned by Malcolm that, yeah, "Everett here he's been a union member for 30 years and don't you think it's just great being organized" and all that and Everett went along with it.

We'd be trying to work and he'd be talking to them guys, it would—it got to the point that you'd have to walk over and say, "Hey, can you give me a hand with this",

you know, [677] try and get him back over so we could get some of this work done.

Q Was he over talking to the mill people on the break time?

A No. During the working time.

Q Approximately how long was your work day on Wednesday?

A We were supposed to be there for ten hours.

Q And based on your observation, approximately how many hours did Mr. Hansen actually appear to be performing some work related task?

A Maybe about half of the day, maybe about five hours.

Q Did you have an opportunity to observe Mr. Hansen's work performance on Thursday the 14th?

A Yes.

Q Please describe what you saw?

A He seemed to working at a little better pace than what he was. I think a lot of that had to do with—it had been mentioned to him that his work—

MS. BRAMMER: Objection, speculative, as to why Malcolm Hansen's working in a perceived pace.

JUDGE HARMATZ: Well, you're going to have to establish a foundation.

BY MR. PEASE:

Q Do you—

THE WITNESS: I know he had been talked to—

MS. BRAMMER: Objection.

[678] THE WITNESS: I was there.

JUDGE HARMATZ: Okay.

BY MR. PEASE:

Q Were you present during any conversation or any—any conversation with anybody with Mr. Hansen relating to his productivity or work performance?

A Yes.

Q And when was that?

A On Wednesday—no, on Thursday morning, Rod had mentioned to him while we were standing there, that he—today he'd like to see a little more work and less talk.

JUDGE HARMATZ: When was this now?

THE WITNESS: On Thursday morning.

JUDGE HARMATZ: This was on Thursday morning?

THE WITNESS: Yes.

BY MR. PEASE:

Q Had you heard Mr. Smithback making any statement to Mr. Hansen of a similar nature at any other time, during the time that you were up there?

A On Wednesday afternoon he had mentioned to him, he would like to see a little more work and less talk.

Q On either of those occasions, did he say anything further on the subject?

A No.

Q Did he say anything on either of those occasions to the

[682] JUDGE HARMATZ: And that was during working time, wasn't it?

THE WITNESS: Yes, it was.

JUDGE HARMATZ: You told MR. [sic] Smithback that?

THE WITNESS: Yes, I did.

JUDGE HARMATZ: Okay.

BY MR. PEASE:

Q Did you hear—strike that.

Were you present during any conversation in which Mr. Hansen was asked by either yourself or another employee, how much money he was making working up at the Boise Cascade?

A Yes.

Q When was that?

A First time, it was mentioned to me was after—trying to recall the date, it's been a little while. I believe that was on the Tuesday, the first actual work day.

Q Who was present?

A At that time, me and Mike Grow were talking to him.

Q Do you recall approximately when in the day it was?

A Just before the inspector showed up.

Q What was the conversation?

A Having to do with, you know, what you know, what he—he had asked us as far as Town and Country, how far are pay—some idea what it was, you know, as far as what we made per hour and then he made mention what they were paying him, [683] compared—and then he—in comparison to what he made when he was working on union jobs.

Q Do you recall any other conversation with Mr. Hansen about how much he was making while at Boise Cascade?

A Well Mike asked him, "well how can you afford to come up and work for us then, if you're used to making that" and he said that—well, he wasn't losing any money by working for us.

Q And when was that statement made, was that part of the conversation on Tuesday?

A Yeah.

Q Did you hear any other statements by Mr. Hansen to that effect, during the time that you were up there?

A Yeah, on Thursday.

Q Tell us about that please?

A It got into a talking about money again and he was mentioning that he was also receiving money from—like he was being supplemented for—from the union while actually working for us, that the money that he was receiving

from Town and Country—from being there with Town and Country was more or less just pocket money, that he—I recall the amount he had mentioned was like \$26.00 or \$27.00 an hour, that he said he was still receiving.

Q Do you recall any conversation that occurred during the lunch period on Thursday?

[698] JUDGE HARMATZ: Incidentally, am I wrong if I were to say that it's my understanding that the four of you virtually lived, slept and ate together, in addition to working together, during that 2 or 3-day period?

THE WITNESS: Yah.

JUDGE HARMATZ: That's a true statement?

THE WITNESS: Yes.

JUDGE HARMATZ: Okay.

BY MS. BRAMMER:

Q You referred to the fact that Mr. Hansen was attempting to fix a disabled 300 threading machine. I believe that was on Wednesday, the 13th. Do you recall that?

A Um-hmm.

Q And that machine was fixed, wasn't it?

A Eventually, yah.

Q And it was back into operation that day?

A By the end—yah, it was down for maybe 2–3 hours.

JUDGE HARMATZ: Who fixed the machine?

THE WITNESS: Malcolm finally got the head to work right.

BY MS. BRAMMER:

Q So it didn't have to be sent out of the work area for repair, did it?

A We did eventually have to bring another one back because—

Q I'm talking about on Wednesday, September 13th.

[699] A No, it didn't get sent out that day, no.

Q Okay.

You testified that there are times, in your opinion, that if the portaband is rocked that the teeth could break off. Do you recall that?

A It will break the blade is what it will do.

Q Maybe I'm thinking of the wrong thing. Pardon me, I think I'm thinking about the threader. When you testified that Mr. Hansen was applying pressure on the threader, I believe it was your testimony that there are times when that is done the teeth could break off. Is that correct?

A Yes.

Q But the incident that you testified to that you saw Mr. Hansen do that was not one of those occasions, was it?

A I don't know if the teeth broke off or not.

Q Did you see any teeth broken off?

A There were teeth that were broke on the threading head, yah, but I don't know when it happened. I know of—

Q There were other people using the portaband that week, weren't there—the threader, excuse me.

A Yes.

Q When you testified that Mr. Smithback commented that he would like to see a little more work and less talk, that was directed to a group of people, wasn't it?

A No, it was directed to Malcolm.

[700] Q Did he say "Malcolm, I want to see a little less talk and more work"?

A Yes.

Q Okay, so your testimony is now that he approached Malcolm and said "Malcolm, I want to see a little less talk and more work"?

A Yes.

Q Okay. Who else was there when he said that?

A There were a number of people in the area at that time.

Q Okay, who?

A The crew that we had working up there. There were also some masons that were—

Q Who was the crew that was working up there that was—in that group when Mr. Smithback said that?

MR. PEASE: I object. That's not the question you asked him. You said "the area".

BY MS. BRAMMER:

Q Do you know the answer to the question I just put to you?

A Well, as far as the general area, there was quite a few people there. We had other—another contractor that was working in the area, there was Boise Cascade people there, you know, there was quite a few people up there at that—in the—

Q Okay, who was in the area close enough to Mr. Smithback that, in your opinion, they could have heard that?

[702] THE WITNESS: Yes.

JUDGE HARMATZ: Did this card appear to have been folded?

THE WITNESS: No.

BY MS. BRAMMER:

Q And you never heard Hansen threaten anybody with any physical harm, did you?

A No.

Q Did Mike Grow ever ask Mick Hansen in your presence simply "Why didn't Mick work for T & C, Town and Country?"

A When we were sitting at lunch, he mentioned it to him, but the way he gestured and said it, it was, you know, right after Mick had asked him, you know, "Well, why don't you join the union?" Mike just came back and said "Well, why don't you join Town & Country?"

Q Your testimony previously was, and correct me if I am wrong, "Why don't you quit the union and work for Town & Country?" wasn't it?

A Yah.

Q Did Mike Grow ever simply just ask Mick Hansen why didn't he come to work for Town & Country?

A No.

MS. BRAMMER: Nothing else.

JUDGE HARMATZ: Mr. Gordon?

MR. GORDON: Thank you, Your Honor.

[703]

CROSS-EXAMINATION

BY MR. GORDON:

Q The Judge asked you a question about four of you living together, eating, sleeping together, driving together. Actually, it was five of you, wasn't it? Wasn't Rod Smithback in that same cabin?

A Yah, including Malcolm, there would have been five, yes.

Q All right. Now, going to Tuesday, what time did you get on the job on Tuesday? I believe that's September 12th.

A We stopped and ate breakfast, and after getting our I.D. cards and that, I don't think it was till like around 8 o'clock before we actually got on inside the gates.

Q Okay. And did Hansen and Tom and Mike go to work before you did?

A No.

Q Okay. When you came, were you working in a different area than they were on that day, at least to start out with?

A No.

Q Okay, you are all working in—

A All in the same area.

Q —same area?

A Um-hmm.

Q How close—were you working in that area close to the scaffold that Tom and Mike were on?

A I was on the scaffold.

[706] on that job?

A Yes. One was owned by Town & Country and other one was Rod Smithback's personal—

Q Okay. Is it your testimony that both were used regularly and frequently on that job?

A Yes.

Q And used by everybody?

A Yes.

Q And Rod's wasn't just for Rod? Rod would let anybody use his?

A Yes.

Q Including Mickey Hansen?

A Yah.

Q And Mike—do I understand correctly that Mike was cutting struts on Tuesday?

A Yah, at the beginning of Tuesday.

Q And with respect to your testimony about measuring, wouldn't it be the same if you measured from top to top as if you measured from bottom to bottom? Don't you come up with the same measurement?

A It makes a difference in what application you are using it on as far as where you are going with your offset.

Q I understand, but you are talking about offsetting a length of conduit, right?

A Right.

[707] Q So you are talking about measuring from the top of that conduit to the top of that same piece of conduit as between the two different levels of offset, right?

A Yah, but when you bend it, you have a gain in your conduit, so your measurement from the center to the center on your bend say if you went from top to top is not the same as if you went from center to center, if you went from bottom to bottom, because of the gain you have in the conduit.

Q Isn't that gain picked up in either the top to top measurement or the bottom to bottom measurement the same?

A You'll have more gain on the—which will be the outside of your pipe, which would be the top.

Q If you turned the pipe over, the top would become the bottom, wouldn't it?

A Yah.

Q And if you took the measurement, it would be the same, wouldn't it?

A One second. I'm going to think about this.
(Pause.)

A When I think about it, yah, it makes sense.

Q Okay.

A But I have done it on the job before and it hasn't worked that way.

Q Okay.

Now, with respect to your testimony about these blades,

[710] A Almost the whole day.

Q And which day would that have been?

A Wednesday.

Q And how far are those walls apart from each other in terms of feet if you could estimate?

A Maybe 10 feet.

Q And how long are they?

A The south wall was maybe 25 feet and the east wall probably 35—40 feet.

Q And is the work that you are doing—I understand this is the area where you are running conduit, right?

A Yah.

Q But in terms of cutting the conduit, threading it and all that preparatory work, cutting struts, is that done between those two walls or in some other area and then brought it?

A Right by them two areas. Our threading machine and everything was basically set up in the middle of the room.

Q Okay, so between the two walls?

A Yah.

Q Going to your conversations with Mickey Hansen on Thursday, I think you told us you had a conversation with him where you told him that as far as you were concerned, he was a good organizer?

A I said he knew what he was doing.

Q Okay. And in that conversation, did you also tell him [711] that you thought he had a lot of guts for staying in the same cabin with all of you guys after he had announced that he was a union organizer?

A Yah, I did.

Q And you mentioned a conversation with Rod Smithback on Thursday, I believe in the afternoon, after your afternoon break where Rod told you that things would be worked out. Do you remember that?

A Yah.

Q Did he tell you how they had been worked out, what was going to happen?

A Yah, he did. He said that the information that Mick had brought up to the inspectors about him working for Ameristaff, it's true that they—that Town & Country couldn't use his license if he was through Ameristaff, and that Ameristaff was going to have to let him go.

JUDGE HARMATZ: Excuse me.

I didn't get the date. When was that?

THE WITNESS: That was on the Thursday.

JUDGE HARMATZ: Okay.

BY MR. GORDON:

Q Thursday afternoon after the afternoon break?

A Yah, it would have been about 3 o'clock in the afternoon.

Q Did Smithback tell you anything more with respect to how things were worked out or was there anything more to that [712] conversation with Smithback?

A He just told me to stay calm, and, you know, don't lose my cool.

Q Okay. Can you recall anything else?

A No, not at the time.

JUDGE HARMATZ: Why did he say—did he tell you why or did you say anything that led to this comment "Just stay cool"?

THE WITNESS: He knew I was—

JUDGE HARMATZ: Were you concerned about anything at the time that you heard this?

THE WITNESS: He knew I was quite upset about the situation and everything. He just didn't want me to get upset and punch him or something like that for something he said. He just told me, you know, "Just stay calm, just stay relaxed, everything will be taken care of".

JUDGE HARMATZ: For something who said? For something that Hansen said?

THE WITNESS: Yah.

JUDGE HARMATZ: What did Hansen say that could have provoked you to punch him?

THE WITNESS: Just the way he was continually riding us about joining.

JUDGE HARMATZ: What did he say that even represented riding you?

[713] THE WITNESS: The way—

JUDGE HARMATZ: What did you interpret that he said as making him riding you, as riding you? "Riding" to me means if you are ribbing somebody or if you are ridiculing them or teasing them or taunting them. What did he do in that line? Am I wrong? Is that what you understand "riding" to be?

THE WITNESS: To me, the riding was all from the time we got in on the job in the morning until we left, you know. All I kept hearing from him, you know, whenever he would say something was, you know, "Hey, join the union, join the union", you know. It was just repetitious, just over and over and over again.

JUDGE HARMATZ: And that was sufficiently provocative for you to be considering punching him?

THE WITNESS: Yah, I had had enough of it. I asked him, you know, "Hey, I don't want to hear no more". You know, I had had enough, so just, you know, that was it.

JUDGE HARMATZ: Mr. Hansen is a pretty good size man, isn't he?

THE WITNESS: Yah.

JUDGE HARMATZ: And you are not so big, are you?

THE WITNESS: I hold my own.

JUDGE HARMATZ: You hold your own.

THE WITNESS: Yes.

JUDGE HARMATZ: So you have been involved in fist to [714] cuffs [sic] before?

THE WITNESS: Yes.

JUDGE HARMATZ: Often?

THE WITNESS: No, I was trained in martial arts for 8 years.

JUDGE HARMATZ: You were trained in martial arts for 8 years. Did you reach a certain level in martial arts?

THE WITNESS: Yes, I did.

JUDGE HARMATZ: What level?

THE WITNESS: Second degree black belt.

JUDGE HARMATZ: Second degree black belt. That's interesting.

So with that kind of training—since you have been back to Wisconsin—how long have you been in Wisconsin?

THE WITNESS: About 3 years.

JUDGE HARMATZ: Three years—have you had any confrontations, fist to cuffs, [sic] outside of the ring and outside of training in that period?

THE WITNESS: No.

JUDGE HARMATZ: You haven't?

THE WITNESS: No.

JUDGE HARMATZ: Okay, you may continue.

MR. GORDON: I have no further questions, Your Honor.

JUDGE HARMATZ: How old are you?

THE WITNESS: Twenty-nine.

[715] JUDGE HARMATZ: And where do you live?

THE WITNESS: 1025—

JUDGE HARMATZ: No, no, no, no, what area?

THE WITNESS: Oshkosh, Wisconsin.

JUDGE HARMATZ: Oshkosh?

THE WITNESS: Yes.

JUDGE HARMATZ: Is that where you were living at the time of this job?

THE WITNESS: Yes.

JUDGE HARMATZ: And you had a non-working wife and a young child?

THE WITNESS: My wife works.

JUDGE HARMATZ: Oh, she does work?

THE WITNESS: Yes.

JUDGE HARMATZ: Was she working at the time of this job?

THE WITNESS: Yes, she was.

JUDGE HARMATZ: Was she working on Thursday, September 13th?

THE WITNESS: Yes, she runs a day care facility out of her home—out of our home.

JUDGE HARMATZ: All right.

Now, how long have you been married?

THE WITNESS: I just got married last July 14th.

JUDGE HARMATZ: Okay, so you are a newlywed, sort of?

THE WITNESS: Yes.

[721] MR. GORDON: I have nothing further.

JUDGE HARMATZ: I just want to follow-up on his questions about top to top and bottom to bottom measurements.

Is pipe before it is worked on marked in any way in terms of top to top and bottom to bottom?

THE WITNESS: No, it's not marked.

JUDGE HARMATZ: After it is bent, is it marked in any way?

THE WITNESS: No.

JUDGE HARMATZ: Isn't it true that very often when you are installing conduit that the person who is doing the bending will not be the person who is doing the actual installation of the bent pipe?

THE WITNESS: No, if I bend it, I put it in and that's true on all the jobs I have worked on.

JUDGE HARMATZ: It would never be bent by somebody other than the person—it would never be installed by somebody other than the person who—it would never be bent by somebody other than the person that is doing the installing?

THE WITNESS: It could be, but that's not the practice we use.

JUDGE HARMATZ: Okay.

I just don't follow your response to Mr. Gordon that though what he says sounds logical, it just doesn't work in application. I can't figure how there would be a difference, [722] you know, in terms of the two measurements. It would seem to me that just as he points out, once you turn the pipe upside down after it is bent, the measure—you couldn't tell the top. If I flipped it 17 times and didn't tell you that it was an odd—that it was flipped an odd time, you wouldn't know whether you were taking a top to top or bottom to bottom measurement. Isn't that an accurate statement?

THE WITNESS: Yes.

JUDGE HARMATZ: Okay.

MR. PEASE: Nothing.

JUDGE HARMATZ: Thank you very much, Mr. Reinders.

(The witness was excused from the stand.)

MR. PEASE: My records show our exhibits 1 through 12, except for 2, which we did not offer, have been received into evidence. Is that correct?

JUDGE HARMATZ: That's what I show.

MR. PEASE: Okay.

And we have no further witnesses and we rest at this time.

JUDGE HARMATZ: Rebuttal?

MS. BRAMMER: Could I have 5 minutes?

JUDGE HARMATZ: Five minutes? Five-minute rebuttal?

Off the record.

(Whereupon, a brief recess was taken.)

JUDGE HARMATZ: Back on the record.

[723] MS. BRAMMER: Malcolm Hansen. Whereupon,

MALCOLM HANSEN

having been previously duly sworn, was recalled as a witness herein and was examined and testified further as follows:

DIRECT EXAMINATION

BY MS. BRAMMER:

Q Did you have in your possession at the job site in International Falls or at any time any cards that referred to you as a union organizer?

A No, I have never had any cards.

Q Did you have with you at that job site any union authorization cards?

A No, I did not.

Q Did you have with you any kinds of cards that employees there would sign?

A No, I did not.

Q Did you ever represent that you did?

A No, I did not.

Q Did you ever see more than one portaband saw on that job?

A No, I did not.

Q To what extent, if any, were you personally involved in the replacement of any blades on the portaband saw that you were aware that was there?

A I changed one blade on the portaband saw.

[724] Q When was that?

A I believe it was on Wednesday morning, September 13th.

Q Could you describe what the circumstances of that replacement were?

A I went to cut some unistrut and the portaband saw was there without a blade in it. I then asked Randy Reinders where I would get a blade. I think he referred me to Smithback.

Q And did you get one?

A Yes.

Q And did you replace it yourself?

A Yes, I did.

Q Did a blade ever break or bend while you were using the portaband saw?

A Not that I recall.

Q Were you ever confronted with any allegation that your use of the portaband saw created a breakage of damage of a blade?

A No, I wasn't.

Q Okay, referring you to—you were in the hearing room during the testimony of Mr. Smithback, Mr. Steiner and Mr. Reinders, is that correct?

A Yes, I was.

Q Okay. Referring you to the allegations involving chipped or dulled bits, did you have occasion to use bits when you [725] were working on the job site there?

A Yes, I did.

Q Okay, and could you describe what bit or bits you used?

A Basically, I use a 1/8 inch pilot bit and I also use a 1/2 inch unibit that I carry with me on all jobs that I have since I have been working in Alaska in 1976.

Q Which bit did you use most frequently there?

A My own personal unibit.

Q Were you ever aware that you chipped or dulled any bits?

A I'm not —

Q On that job?

A I'm not aware of it, no.

Q Were you ever told that you did?

A No, I was not.

Q When you were on that job, you had occasion to use what's called a "300 pipe threader", is that correct?

A Yes, I did.

Q Is that the correct name for it?

A Yes.

Q When did you first use that machine?

A I first used that machine sometime on Tuesday cutting some inch and a half pipe and threading it.

Q Okay. And where did you first get the die that's used on that machine? From whom?

A I first got die from Rod Smithback on Wednesday morning.

[726] Q Had you ever observed that he had been using it?

A I observed him Wednesday morning that he was working on it, and I told him he wasn't allowed to do electrical work in the State of Minnesota, and he said "O.K.", and he give me the die.

Q Did you observe that you ever cracked the threader on that machine through the use of a hammer?

A Oh, yes, I cracked — but the machine is made so that the dogs in there will hold the pipe and turn the pipe and the die itself stays stationary.

Q Are the dogs — are you talking about teeth or what?

A Yah, they will be — the teeth will be in the dogs, and that will hold the pipe, and before that, I observed Tom Steiner using it, and while threading the pipe, the teeth or

the machine itself actually slipped on the pipe causing it to scar it up, take the galvanizing off of it, and this will happen many times if the teeth are worn or so on so forth. They are replaceable. I don't know if they know that or not, but they are. So I did hit it with a hammer to be sure that the teeth were set in the pipe so this wouldn't happen. This is a common practice.

Q In your work as an electrician since 1956, have you done that before?

A Yes, I have.

Q Did you ever say anything to Rod Smithback regarding the [727] condition of the 300 threader?

A Yes, I did.

Q First of all, when was that?

A I believe it was on Wednesday morning after I worked on the dies and guns so they would work again, I told Rod that he had to order some new dies for it.

Q And what did he say?

A I guess he acknowledged it and to my knowledge, he was going to do it.

Q Did he indicate to you in any way that he thought that your request for new dies for that was due to any abuse by you?

A No.

Q Can you explain for what purpose you were throwing clamps up to Gary Steiner and Randy Reinders when they were on the scaffolding on Tuesday, September 12th?

A Well, basically, I was throwing them up to them as they used them so they wouldn't have to have them up on the scaffold and in their way. Basically, I was handing up pipe to them and moving the scaffold when so needed, and really, there was nothing else for me to do other than to hand up the pipe and move the scaffold, and so I threw up the clamps as they needed them.

Q Based on your 30 years in the trade, is it your experience that clamps are kept on the scaffolding during [728] work?

A I can be or it can't be. My experience has been the least amount of debris you have on the scaffolding when you are working, the safer it is.

Q Did you make a two-person job a three-person job in your opinion?

A No, I did not.

Q Referring you to the allegations that you were cutting—when you were mounting disconnects, that you were cutting the nipples in a crooked fashion, can you explain how that cutting is done?

A The cutting is done basically by a machine by—a pipecutter is mounted stationary and the pipecutter has a roller—two rollers on one side of it and the opposing side has a cutting blade that is like a roller with a sharp edge. You put your pipe into it and you screw the pipe up to it and you turn the machine on and it will cut the pipe itself.

Q Is it your experience that the cut—

JUDGE HARMATZ: But you can get an off-cut if you don't install the pipe into the machine properly? Is that possible?

THE WITNESS: I would say that would be nearly impossible. I have never seen it done in all my years and experience where you would get a cut that was crooked on a pipe in a threader. I have never seen it done. There's a lot of things I haven't seen, but I would say it would be [729] impossible.

BY MS. BRAMMER:

Q Did you ever have—did you ever talk to Boise Cascade employees in the welding shop during work time?

A Oh, yes, I did.

Q Was there ever any work-related reason that you were doing so?

A Yes, there was.

Q Okay, can you just briefly describe what those reasons were?

A After the State inspector was there on Tuesday, he said that "Three men can be here on the job, one licensed man, two unlicensed men. The licensed man is Malcolm Hansen. He will be in charge and supervise the installation of all electrical apparatus."

Q Okay, did you ever talk to them on other occasions about the progress of the job there?

A Yes, I did.

Q Did you ever tell anyone at the Boise Cascade job site, and specifically Tom Steiner, Randy Reinders, Mike Grow or Rod Smithback that your salary at Town & Country was being supplemented in any way?

A No, I did not.

Q Did you know at that time it was being supplemented in any way?

[730] A No, I did not.

Q Did you ever tell anyone what your wage and benefit package was valued at when you were working union jobs in this area?

A Yes, I did.

Q Did you ever tell anyone from Town & Country, and specifically, Dennis Defferding, Ron Sager or from Ameristaff, Steven Buelow, that you had a Master's License?

A No, I did not.

Q Did you ever tell that to any employees at the work site once you arrived in International Falls?

A No, I did not.

Q And that's not true is it?

A No, I have never had a Master's License.

JUDGE HARMATZ: Excuse me, but is there such a thing as a Class "A" Electrician Master's License?

THE WITNESS: I guess you would have to refer to Mike Priem or somebody.

JUDGE HARMATZ: You don't know?

THE WITNESS: I suppose there is, yah.

JUDGE HARMATZ: There is such a thing as a Class "A" Electrician?

THE WITNESS: Class "A" Journeyman.

JUDGE HARMATZ: Class "A" Journeyman Electrician.

THE WITNESS: Yah.

[731] JUDGE HARMATZ: And what you are saying is a Master Electrician?

THE WITNESS: Yah, there's a class "A" and a Class "B", yah.

JUDGE HARMATZ: Is there a Class "A" and Class "B" Master?

THE WITNESS: Yah.

JUDGE HARMATZ: Okay.

BY MS. BRAMMER:

Q How old are you?

A 50 years old.

Q And are you married?

A No, I lost my — my wife died in 1982.

Q What is your understanding, if you have one, on the practice of measuring conduit top to top versus bottom to bottom?

A My experience, it really doesn't make any difference one way or another. It's all the same.

Q Are you familiar with a machine — 555 used for bending conduit?

A Yes, it's a Greenly machine. It's referred to in the trade as a "triple nickel". I have used a 555 for at least 10 years.

Q And so you are familiar with the usage of that?

A Yes, I am.

[732] Q To what extent has it been your experience —

JUDGE HARMATZ: How about the multipliers that are used — the multipliers that are used in conjunction with that? Would you have to make any references?

THE WITNESS: They are in my head — the multipliers I use on all bending.

JUDGE HARMATZ: Can you recall an incident in which you were observed reading what I'll call the charts that were on the machine?

THE WITNESS: I bend my conduit just a little different than other people. I do not use the charts that's on the top of a bender.

JUDGE HARMATZ: And you heard the testimony that you did?

THE WITNESS: Yes, I did.

JUDGE HARMATZ: And that's false testimony according to you?

THE WITNESS: Yes, it is.

BY MS. BRAMMER:

Q Are you able to say here today what multiplier you would use for 60 degrees?

A 1.1.

Q Okay, and 45?

A 1.41.

Q How about 30?

A Two.

[733] Q 22?

A Three.

Q 22 and a half, excuse me. 15?

A Four.

Q And 7 and a half?

A Eight.

Q To what extent has it been your experience that someone other than the installer of conduit would have bent it?

A My experience over the years, whenever it is more efficient to have somebody up in the air measuring and installing it and having somebody on the ground bending it or handing it up to them, this is a common practice.

Q In your work as an electrician since 1956, have you ever been disciplined or terminated for any reason including the improper work performance?

A Would you please restate the question?

Q Yes. Have you ever been discharged for any cause from a job since you have been working as an electrician?

A None other than reduction in force.

Q No, a discharge for a cause.

A No.

Q Do you know what that term means?

A I believe it means fire.

Q Okay. Have you ever received any discipline because of [734] insufficient or improper work performance?

A No, I haven't.

Q So how many years have you been referred by the IBEW by any local to jobs?

A The first time I was referred by an IBEW local, I was referred out of Local 31 in Duluth in 1956.

Q And in many situations, employers have a right of refusal for referrals, is that correct?

A Yes, it is.

Q Have you ever been refused when referred?

A No, I haven't.

Q Can you explain briefly what a "C" in the line is?

A Well, a "C" in the line is a fitting that has an opening it is that many times is used basically to allow for a pulling wire or rope to get into the line to pull it. Years

ago, before we had vacuum cleaners and blowing and jet lines and so on and so forth, they limited the "C" to 100 feet so it would allow a 100-foot fish tape to get in there.

Q And to what extent, if any, did you make an evaluation on the need for that at the Boise Cascade job?

A Well, I don't—I see nothing wrong with putting "C" 's in there, but if you don't have a "C", I don't really believe it necessitates a "C" if a job is going to be held up and you have facilities to get the line in for 200 feet. I leave it out.

[735] JUDGE HARMATZ: What facilities did you have?

THE WITNESS: My understanding, the facility that they were to have is they were to have a vacuum cleaner or 250-foot fish tape.

BY MS. BRAMMER:

Q How did you get that understanding?

A I think that we stopped installing the pipe and when Mr. Smithback returned to that area and said "Go ahead and put it in without the "C", so that's what we did.

Q Regarding the testimony that was heard on the cutting of struts, and allegations of improper cutting of struts.

A Yes.

Q Did you cut struts when you were on the job in International Falls?

A Oh, yes.

Q Based on your experience, did you believe that you had improperly cut any struts when you were there?

A I don't believe I improperly cut any struts.

Q Did you ever cut any struts on which there were jagged or uneven corners?

A When you cut a strut, there will be a little jagged edge that you take off with a file, but basically, the struts I cut were square and very usable.

Q Did Rod Smithback ever approach you or confront you in any way regarding the manner in which you were cutting struts [736] on that job?

A No one ever approached me in the manner I cut struts on that job.

Q Anyone from Boise Cascade?

A No.

MS. BRAMMER: Nothing else.

JUDGE HARMATZ: Were you aware of any suspension of the order of performance of the job caused by the necessity of redoing struts?

THE WITNESS: Yah, there were some struts that had to be redone. There was a change in plans on the job. There was also a transformer that was installed and there was a change or a hold on that because they thought it was going to be in the way of the operation of an electric door, a fire door.

JUDGE HARMATZ: How about redone due to improperly cut non-square, jagged, non-filed struts?

THE WITNESS: None that I am aware of, not for just the cut itself. There was some for—to change lengths that—

JUDGE HARMATZ: But that was due to a change in plans?

THE WITNESS: Yes.

MS. BRAMMER: Nothing else.

CROSS-EXAMINATION

BY MR. GORDON:

Q You mentioned a unibit that—your own personal unibit?

A Yes.

[737] Q Did you carry that bit with you?

A I have carried a unibit in my pocket ever since I worked in Alaska in 1976. Every night it sits on my dresser. I put it my pocket. I have two items I carry with me all the time.

Q Do you have it with you now?

A Yes, I do.

Q Would you show it to the Judge?

JUDGE HARMATZ: Better not be 4 feet long. (Witness handing Judge unibit.)

BY MR. GORDON:

Q Did you have that unibit with you at the Boise project?

A Yes, I do.

Q Did you use it?

A Yes, I did.

JUDGE HARMATZ: It's still cold.

BY MR. GORDON:

Q That particular unibit—how would you compare that to the bits that you find in the standard tool inventory of most contractors in terms of quality?

A I would say it is much higher quality. I would surmise right now that this bit costs \$22.00, my own personal bit.

Q Okay.

And I just want to ask you a couple questions about this threader. Now, when you are threading pipe, you insert a die into the threader, right?

[738] A Actually, the die is a part of the threader. The die stays stationary.

Q Okay, so what happens when you change diameter of pipe, vis-a-vis, the die or the threader?

A Well, there's two things: either you can change the die or some dies are adjustable.

Q So which is it up at Boise?

A They had both. I believe they had a half-inch die and I believe they had a 3/4 and 1/2 inch adjustable die. I believe they had a 2-inch to 1-inch adjustable die.

Q Okay. Now, what were you cutting or threading on Tuesday?

A Inch and a half pipe.

Q Okay. And did that change as you went to Wednesday?

A Yes, it did.

Q And what did it change to?

A I believe on Wednesday, that the nipples I cut for the welding disconnects—and I'm not positive, but they were either half or 3/4 inch.

Q But it was definitely a different size from the day before?

A Yes, it was.

Q And did that necessitate using either a different adjustable die?

A Yes, it did.

[739] Q And when you started using that, the second adjustable die on Wednesday, did you notice anything about it at the time you started to use it?

A Well, I got the die before I ever started using it. I got the die from Rod Smithback. Rod Smithback was going to work on the die on Wednesday morning, and I told him "Rod," I said "I thought the State inspector said you couldn't do any work here? I better do that." And he gave me the die.

Q Just so I am clear on this, so actually the die—work was done on the die before it was ever used to thread pipe as far as you know?

A As far as I am concerned, yes.

Q And then after Rod turned the die over to you, you went to work on it?

A Yes, I did.

Q And you fixed it?

A I fixed it the best I could, yes.

Q And then it was used?

A Yes, it was.

MR. GORDON: That's all I have, Your Honor.

CROSS-EXAMINATION

BY MR. PEASE:

Q Malcolm, isn't it true that the electrical work that you said Rod was doing was attempting to repair that threading machine?

[740] A He was attempting to repair a threading machine that's used in the electrical industry.

MR. PEASE: No further questions.

JUDGE HARMATZ: Anything further from this gentleman?

MS. BRAMMER: No.

JUDGE HARMATZ: Thank you, Mr. Hansen.

(The witness was excused from the stand.)

MR. GORDON: I have a rebuttal witness, Your Honor.

Should I proceed?

JUDGE HARMATZ: Proceed.

MR. GORDON: Michael Priem.

Whereupon,

MICHAEL PRIEM

having been previously duly sworn, was recalled as a witness herein, and was examined and testified further as follows:

JUDGE HARMATZ: You may go ahead.

MR. GORDON: Thank you, Your Honor.

Charging Party 4.

(The document referred to was marked for identification as Charging Party Exhibit No. 4.)

DIRECT EXAMINATION

BY MR. GORDON:

Q Mr. Priem, I have handed you what has been marked as Charging Party Exhibit No. 4. Can you identify that document [741] for us, please?

(The witness was proffered the document.)

A Yes, this is work record card that is kept on file in Local 292's hiring hall office, a copy of work record file for Malcolm Hansen.

Q Now, in the course of performing your duties for Local 292, have you been involved in the operation of the hiring hall?

A Yes, I ran the hiring hall operation from May of 1988 through November 1st of 1989.

Q So you are familiar with the preparation and keeping of these documents?

A Yes.

Q And with respect to the record for Mr. Hansen or records, generally, do you keep track of the reason why the individual leaves a job?

A Yes.

Q And do you note that reason by the use of abbreviations on the hiring hall record?

A Yes.

Q Let me take you through the representative abbreviations that appear on Mr. Hansen's card. The first one I see is across from 10/5/67 "VQ".

A Voluntary Quit.

Q Okay. The next one down is "RF".

[742] A Reduction in Force.

Q Okay. Are there any other abbreviations that appear on this card?

A No.

Q Are there any other abbreviations that are used with respect to these cards?

A Yes.

Q And what is that?

A "DC".

Q And what does that stand for?

A Discharge for Cause.

Q So based on your review of Mr. Hansen's work record, he has never been discharged for cause?

A Never.

Q Now, I notice that the first entry is 8/24/67 and it looks like the last entry is 10/24/89.

A Correct.

Q And in between, he has a number of referrals to different jobs. First, let me ask you, do you keep track of when an individual is referred to a job and where the employer refuses to accept that individual?

A Yes.

Q And would that show up on this card?

A Yes.

Q And how would it show up?

[743] A It would be written in, not as an abbreviation, but it would be written in as a "turn around".

Q Okay, you use the phrase "turn around"?

A Right.

Q And there are none of those on Mr. Hansen's card?

A No.

Q Now, with respect to the number of jobs that Mr. Hansen has held over the years, is there anything unusual about that?

A No.

Q Why is that?

A It's common practice. You are referred out to a job, the job is done. If the contractor you are working for is running low on work, you come back to the hall and you go right back out; it's common practice.

Q That's the way the referral system works?

A Yes.

MR. GORDON: Move the admission of Charging Party's Exhibit 4, Your Honor.

MR. PEASE: Object: hearsay.

JUDGE HARMATZ: Overruled. Business record.

(The document referred to, having been previously marked for identification as Charging Party's Exhibit No. 4, was received in evidence.)

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Star Tribune Sunday, September 3, 1989

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EOE

ELECTRONICS MEDICAL EQUIPMENT REPAIR

Immediate opening for a medical equipment repairer with 3 years of experience in servicing a wide variety of biomedical equipment. Graduate of a certified 2 year program in electronics and medical equipment repair. Salary is \$12.55 per hour. For application please write U.S. Office of Personnel Tech. Change, 1000 E. 1st St., Suite 100, St. Louis, MO 63101 or call 612-75-3428 (Inquiries please only). Send resume for consideration to: 1000 E. 1st St., Suite 100, St. Louis, MO 63101.

VETERANS AFFAIRS MEDICAL CENTER

One Veterans Office
Mail: MO 65417
Equal Opportunity Employer

ELECTRONICS

\$5.50-\$6/HOUR

We are looking for people with electronic experience working on PC boards. Soldering experience helpful.

C.S.I.

941-0149

ELECTRONICS

Solderwave operator needed for electronics manufacturer. Good mechanical aptitude. Solderwave preferred helpful. But not necessary. Apply in person at NPEC, 500-5th Av., N.W., Suite 1000, New Brighton, MO 65112.

EMERGENCY SERVICES DIRECTOR

MacLeod County is accepting applications for a permanent position to be shared on an equal basis between the City of Hutchinson and the County. Qualifications desired include: a working knowledge of SARA laws, previous work with civil defense emergency warning systems and knowledge of fire-life and environmental protection. Minimum requirements: a high school diploma and 4 years of emergency services experience in a similar position. For consideration, send resume to: Director, MacLeod County, 222008, 1st St. SW, DDCO, A County, MO-65112.

ENGINEER/DESIGN MGR ELECTRICAL SWITCHES TO 544.000 + BONUS

Locally based mfg seeks person w/ varied circuit board or memos design exp. EOE, green persons with exp. Call 612-437-5184

MARTIN NICHOLS

3500 W. 80TH ST.
Overland Park, KS 66207

ENGINEER/INSPECTOR SUPERVISOR

Immediate opening for a Quality Engineer with experience in electrical and electronic devices. Must have excellent communication, problem-solving, and interpersonal skills. 3-5 years experience in electrical and electronic devices. Salary: \$17,454.00 to \$21,744.00. Applications will be accepted until the position is filled. Send letter of application and resume to: above position.

QUALITY ENGINEER

Immediate opening for a Quality Engineer with experience in electrical and electronic devices. Must have excellent communication, problem-solving, and interpersonal skills. 3-5 years experience in electrical and electronic devices. Salary: \$17,454.00 to \$21,744.00. Applications will be accepted until the position is filled. Send letter of application and resume to: above position.

TECHNICAL ORDNANCE INC.

654 Industrial Blvd
Winona (MN), MN 55987

Engineer/Marine Biologist wanted for growing co. serving potential. Precipitation. Call Tom at 591-1180. No mfg.

ENGINEER/SENIOR DESIGNER

Shurna Corporation, a rapidly expanding Asphaltpipe plant manufacturer is seeking qualified candidates to its Mechanical Engineer/Designer & Electrical Designer. Heavy fabrication experience is required. Send resume and salary requirements to: Shurna Corporation, P.O. Box 327, Marquette, MN 55859

AIR COND./HTG.

Business expansion provides an opportunity for experienced HVAC sales engineers to call on commercial & industrial accounts. Since 1974, Thermodyne Air Conditioning has maintained a strong base of satisfied customers. Our services include design, engineering, installation, service & maintenance of commercial & industrial air conditioning, heating, energy management, & building automation systems. Basing sales consultants in the Minneapolis-St. Paul area. Send resume to: Thermodyne Air Conditioning, 1115 Hanson Court, Inc., MN 55429 or call 612-75-3428 (Inquiries please only). Send resume for consideration to: Thermodyne, 550-1144.

ASSISTANT TO THE CITY ENGINEER

SALARY \$28,000 to \$32,000
Work involves the supervision for the design, construction and planning of public works improvement.
QUALIFICATIONS: Degree in Civil Engineering with experience in design/construction or equivalent job experience.
Send resume by September 15, 1989 to Jeffrey A. Hager, P.E., City Engineer, City Hall, Brainerd, MN 56401.

AUTOMATION ENGINEER

Needed in eastern N. Dakota. MACH. or elect. degree & 5+ yrs. exp. with factory automation. H.L. YOH CO. 612-645-2679

CIVIL ENGINEERS

Immediate management opportunities in the U.S. Navy Civil Engineer Corps for civil, mechanical, and electrical engineers. Navy civil engineer officers are more than just managers; they are engineers, managers with such diverse as: Design, construction, and repair of facilities, and repair of facilities. Call 437-784-0040

CIVIL/STRUCTURAL ENGINEER

Industrial consulting engineer office has an immediate need for a registered, professional civil structural engineer with 10 years or more industrial design experience. Foundation and structural design experience for heavy machinery desirable. We offer competitive salary, excellent benefits, environment and benefits. Please send resume to: Engineering Firm, P.O. Box 11530, Eugene, OR 97402

ENGINEER, Civil-Sub., 770-4477

Suburban area, near the Star Tribune, 437-784-0040

CONTINUATION ENGINEERING MANAGER

Continuation Engineering has an immediate opening for a Continuation Engineering Manager reporting to the V.P. of Operations. Responsibilities include the selection of new product development and technical support and product management. This position requires the management of a team of engineers and technicians. A continuing education requirement is required. Send resume to: Continuation Engineering, 1115 Hanson Court, Inc., MN 55429 or call 612-75-3428 (Inquiries please only). Send resume for consideration to: Continuation Engineering, 550-1144.

The successful candidate will have a minimum of 10 years experience in an electronic manufacturing environment and B.S.E.E. Send resume and salary history to:

EMERSON

Electronic

Molten Controls

Personnel Department
1345 Park Road
Chaska, MN 55317

Equal Opportunity Employer

IMMEDIATE OPENING CIVIL ENGINEERING TECH OR P.E./MN

Heavy office design/drafting experience. Structural engineering design, surveying, and/or design/drafting experience. Send resume to: 425 Portland, MO, MO 65448.

AIR POLLUTION PROFESSIONAL

We are an engineering consulting firm serving private & public sectors. Large Client base with strong national needs in air quality regulation & control. Our rapidly growing staff of civil, chemical, environmental and structural engineers & scientists specializes in environmental chemistry, particularly hazardous waste and biological. We are seeking an individual w/ knowledge & experience in air pollution regulation & source emission inventories, design, modeling, preparing air quality permit applications, health & risk assessment for air quality. Requires BS or MS in engineering or science w/ min 2 yrs exp in air pollution regulation & control. Strong academic background, good ability, exp with VOC's, good ability, exp with air quality regulation & control. All screening done by RESUME ONLY. Mail resume w/ salary req. to:

Barb Engineering Co.
1000 E. Main Street, Suite 100

BEST AVAILABLE COPY

J. Edgar Hoover
 8-PA-1035, 1094
 and 11080 (EC, Board, Party)
 by [redacted] [redacted]
 [redacted] [redacted]
 J. Edgar Hoover
 Town of Country
 Date: 12/11/89 Witness: [redacted] Reporter: [redacted]
 No. Pages: 1



LOCAL 292

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS

United Labor Centre, 2nd Floor, Suite 292
312 Central Avenue • Minneapolis, Minnesota 55414
(612) 379-1292

September 14, 1989

189

Town and Country Electric
2662 American Drive
Appleton, WI 54915

Dear Sirs:

Please be advised that Mickey Hansen, an employee of Town and Country Electric working on the Boise Cascade project in International Falls, Minnesota, is a member of IBEW Local 292, Minneapolis, Minnesota. Mr. Hansen will be engaging in organizing activities and is protected by the National Labor Relations Act.

Sincerely,

MICHAEL J. PRIEM
Business Rep
Local 292, IBEW

MP:bk
opelu #12, afl-cio

CC: NLRB
IBEW Local 294

certified #P043 935 511

Case # 184A-11035, 11044
and 11080

CL 50

Don & County

Date:

12/11/89

By:

No. Pages: 1



TOWN & COUNTRY ELECTRIC, INC.

September 21, 1989

Mr. Michael Priem
International Brotherhood of Electrical Workers
United Labor Centre
2nd Floor, Suite 292
312 Central Avenue
Minneapolis, MN 55414

Dear Mr. Priem:

We acknowledge your September 14, 1989 letter which is stamped by the Post Office dated September 16, 1989 and received by us September 21, 1989 concerning Mickey Hanson.

We wish to inform you that Mr. Hanson has never worked for our company. Mr. Hanson was employed by Ameristaff. We are enclosing copies of Mr. Hanson's acknowledgement of this fact, which we obtained from Ameristaff. Please contact Ameristaff directly if you have any further questions.

Sincerely,

Ronald L. Sager

Ronald L. Sager
Manager Human Resources

RS:vb

cc: file

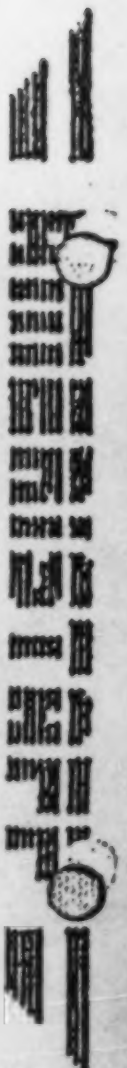
Case No. 18-CA-11035/1104 Original Filing No. 255(b)
and 11080 (CC, Board, Party)
Disposition: Referred Referred
IN THE MATTER OF: Town & Country
Date: 12/11/89 Witness: SMW Reporter
No. Pages: 7

P.O. BOX 627
2662 AMERICAN DRIVE

P.O. BOX 442
N 88 W. 16414 MAIN STREET

2423 AMERICAN LANE

GC 5(b)



PERSONNEL CONTRACTORS

115 S. Jefferson Street Suite 304
Green Bay, WI 54301
(414) 435-4455

**TERMS OF EMPLOYMENT
WITH**

191

Malcolm H. Hansen SS 481 46 9951

STARTING DATE:

9/11/89

STARTING TIME:

CLIENT COMPANY:

Town/Country Electric

CLIENT LOCATION:

Appleton WI

CLIENT CONTACT:

Ron Sager

RATE PER HOUR:

15.00

OVERTIME RATE:

22.50

(After 40 Hrs. Per Wk.)

TRAVEL AGREEMENTS:

~~25.00~~ 25.00 PER DIEM IN

ADDITION TO PER MILEAGE PAY
AS SPECIFIED BY TOWN AND
COUNTRY ELECTRIC.

PER
Day
WOTKING

I understand and have agreed to the terms listed above. In addition I have received, read and understand the policies regarding professionalism, Payroll Procedures, Time Ticket Completion, Overtime Pay, Worker's Compensation, Withholding Exemption Certificate, Employee Non Competition and Confidential Information Agreement, Representation, Rules and Regulations, Safety Rules and Regulations, Grievance Procedure and Insurance, and I agree to abide by them.

SIGNATURE

DATE

Malcolm H. Hansen 9/11/89
Jan 12 11

AMERISTAFF EMPLOYMENT AGREEMENT

WHEREAS, the undersigned (hereafter designate Employee), is desirous of entering into a contractual relationship with AMERISTAFF for the purpose of providing contract labor, and;

WHEREAS, AMERISTAFF, in consideration of the covenants of the Employee, the above mutual as hereinafter more particularly set out, agrees to attempt to assign or otherwise procure employment for the Employee.

NOW THEREFORE, IT IS STIPULATED AND AGREED by the undersigned Employee as follows:

1. Employee hereby agrees and accepts an employment referral as set out below:

Company Town & Country Electric Date 9/7/89

2. In consideration of said referral, Employee agrees that all business or technical information revealed or discovered by the employee in the course of his or her employment shall be deemed confidential and shall not be disclosed or revealed to anyone without the express written consent of AMERISTAFF or its clients. The information referred to herein includes, but is not limited to, all originals or copies of documents, drawings, products, models or mockups, and technical or mechanical data associated therewith.

3. The Employee agrees that all discoveries or improvements conceived, devised or in any way discovered by him or her in the course of his or her employment shall be, and are, the property of AMERISTAFF and/or its clients. The Employee agrees to execute all documents necessary for AMERISTAFF, its clients, agents or assigns to secure appropriate patents, trademarks, or other indicia of ownership.

4. Employee warrants and represents that upon execution of this document he or she is under no current or future obligation, whether contractual or otherwise, with any other employer or contract labor provider, and that his or her placement at the position set out below is solely a product of the contractual relationship contemplated in this document.

5. Employee acknowledges AMERISTAFF as his or her employer, and recognizes AMERISTAFF's property rights in its relationships with its clients and customers. Employee agrees that he or she will do nothing to damage the interest of AMERISTAFF set out above, including, but not limited to, any conversion or usurpation of the rights of AMERISTAFF.

6. Employee agrees that should his or her employment with AMERISTAFF for any reason cease, he or she will not, for a period of 60 days, accept employment from any client or customer of AMERISTAFF for whom the employee has provided labor immediately prior to said termination without first obtaining the written consent of AMERISTAFF.

7. Employee agrees that upon termination of his or her employment with AMERISTAFF for any reason, he or she will not, for a period of 60 days accept a referral from a competitor of AMERISTAFF to work for a customer or client of AMERISTAFF whom the Employee has provided labor to immediately prior to said termination.

8. Employee agrees that should he or she breach this agreement, AMERISTAFF would be entitled to all remedies at law, both legal and equitable, including injunctive relief, and further that the Employee will be responsible to AMERISTAFF for all damages incurred as a result of the breach including AMERISTAFF's costs, disbursements, and actual attorneys fees.

9. Employee agrees that his or her referrals by AMERISTAFF, both present and future, constitute valuable consideration of the promise made herein.

Dated this 7th day of SEPTEMBER, 19 89, at

MINNEAPOLIS, MINNESOTA

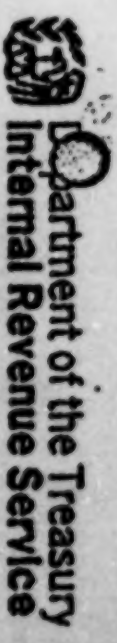
EMPLOYEE

POSITION

Electrician

1/1/89

1988 Form W-4



193

Purpose. You must complete Form W-4 so that your employer can withhold the correct amount of Federal income tax from your pay.

Exemption from withholding. To be exempt, you must have owed no Federal income tax last year and must not expect to owe any this year. You may not claim exempt status if you can be claimed as a dependent of another person, have any nonwage income, and expect your total income to be more than \$500. If exempt, only complete the certificate at the bottom of this page.

Basic instructions. Employees who are not exempt should complete the Personal Allowances Worksheet. Additional worksheets are provided on page 2 for employees to adjust their withholding allowances based on itemized deductions, adjustments to income, or two-earner/two-job situations. For accuracy, complete all worksheets

that apply to your situation. The worksheets on this form are designed to help you figure the number of withholding allowances you are entitled to claim. However, you may claim fewer allowances than this.

Head of Household. Generally, you may claim head of household filing status on your tax return only if you are unmarried and pay more than 50% of the costs of keeping up a home for yourself and your dependents) or other qualifying individuals. **Marriage income.** If you have a large amount of nonwage income, from sources such as interest or dividends, you should consider making estimated tax payments using Form 1040-ES. Otherwise, you may find that you owe additional tax at the end of the year.

Two-Earner/Two-Jobs. If you have a working spouse or more than one job, figure the total

number of allowances you are entitled to claim on all jobs using worksheets from only one Form W-4. This total should be divided among all jobs. Your withholding will usually be most accurate when all allowances are claimed on the W-4 filed for the highest paying job and zero allowances are claimed for the others.

Advance Earned Income Credit. If you are eligible for this credit, you can receive it added to your paycheck throughout the year. For details, obtain Form W-5 from your employer.

Check Your Withholding. After your W-4 takes effect, you can use Publication 919, *Is My Withholding Correct for 1988?* to see how the dollar amount you are having withheld compares to your estimated total annual tax. Call 1-800-424-3676 (in Hawaii and Alaska, check your local telephone directory) to obtain this publication.

Personal Allowances Worksheet

A Enter "1" for yourself if no one else can claim you as a dependent : **A** —
B Enter "1" if: { 1. You are single and have only one job; or
 2. You are married, have only one job, and your spouse does not work; or
 3. Your wages from a second job or your spouse's wages (or the total of both) are \$2,500 or less. : **B** —

C Enter "1" for your spouse. But, you may choose to enter "0" if you are married and have either a working spouse or more than one job (this may help you avoid having too little tax withheld) : **C** —
D Enter number of dependents (other than your spouse or yourself) whom you will claim on your tax return : **D** —
E Enter "1" if you will file as a head of household on your tax return (see conditions under "Head of Household," above) : **E** —
F Enter "1" if you have at least \$1,500 of child or dependent care expenses for which you plan to claim a credit : **F** —
G Add lines A through F and enter total here : **G** —

For accuracy, do all worksheets that apply.

If you plan to itemize or claim adjustments to income and want to reduce your withholding, turn to the Deductions and Adjustments Worksheet on page 2.

If you are single and have more than one job and your combined earnings from all jobs exceed \$25,000 OR if you are married and have a working spouse or more than one job, and the combined earnings from all jobs exceed \$40,000, then turn to the Two-Earner/Two-Job Worksheet on page 2 if you want to avoid having too little tax withheld.

If neither of the above situations applies to you, stop here and enter the number from line G on line 4 of Form W-4 below.

..... Cut here and give the certificate to your employer. Keep the top portion for your records.

Form **W-4**

Department of the Treasury
Internal Revenue Service

Employee's Withholding Allowance Certificate

For Privacy Act and Paperwork Reduction Act Notice, see reverse.

OMB No. 1545-0010
1988

1 Type or print your first name and middle initial

Last name

2 Your social security number

Home address (number and street or rural route)

City or town, state, and ZIP code

3 Marital Status

☒ Single ☐ Married
 Note: If married, but withheld at higher Single rate, nonresident alien, check the Single box.

4 Total number of allowances you are claiming (from line G above or from the Worksheets on back if they apply)

5 Additional amount, if any, you want deducted from each pay

6 I claim exemption from withholding because (check boxes below that apply):

- a ☒ Last year I did not owe any Federal income tax and had a right to a full refund of ALL income tax withheld, AND
 b ☒ This year I do not expect to owe any Federal income tax and expect to have a right to a full refund of ALL income tax withheld.

c If both a and b apply and you satisfy the additional conditions outlined above under "Exemption From Withholding," enter the year effective and "EXEMPT" here. Do not complete lines 4 and 5 above

7 Are you a full-time student? (Note: Full-time students are not automatically exempt.)

Year **1988** ☐ Yes ☒ No

Under penalties of perjury, I certify that I am entitled to the number of withholding allowances claimed on this certificate or, if claiming exemption from withholding, that I am entitled to claim the exempt status.

Employee's signature

Date

8 Employer's name and address (Employer: Complete 2, 9, and 10 only if sending to IRS) 9 Office code 10 Employer identification number

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1 EMPLOYEE INFORMATION AND VERIFICATION: (To be completed and signed by employee.)

Name (Print or Type) Last	First	Middle	Birth Name
MALCOLM	H	HANSEN	Samuel
Address Street Name and Number			ZIP Code
805 2nd Ave			BUFFALO NY 14203
Date of Birth (Month/Day/Year)			Social Security Number
4-4-35			481-46-9951

I attest, under penalty of perjury, that I am (check a box):

- ☒ 1. A citizen or national of the United States.
☐ 2. An alien lawfully admitted for permanent residence (Alien Number A _____).
☐ 3. An alien authorized by the Immigration and Naturalization Service to work in the United States (Alien Number A _____, expiration of employment authorization, if any _____).

I attest, under penalty of perjury, the documents that I have presented as evidence of identity and employment eligibility are genuine and relate to me. I am aware that Federal law provides for imprisonment and/or fine for any false statements or use of false documents in connection with this certificate.

Signature Malcolm H Hansen Date (Month/Day/Year) 9, 7, 1989

PREPARED/TRANSLATOR CERTIFICATION (To be completed if prepared by person other than the employee). I attest, under penalty of perjury, that the above was prepared by me in the request of the named individual and is based on all information of which I have any knowledge.

Signature	Name (Print or Type)	City	State	Zip Code
Address (Street Name and Number)				

2 EMPLOYER REVIEW AND VERIFICATION: (To be completed and signed by employer.)

Instructions:

Examine one document from List A and check the appropriate box. OR examine one document from List B and one from List C and check the appropriate boxes. Provide the Document Identification Number and Expiration Date for the document checked.

List A
Documents that Establish Identity and Employment Eligibility

- ☐ 1. United States Passport
☐ 2. Certificate of United States Citizenship
☐ 3. Certificate of Naturalization
☐ 4. Unexpired foreign passport with attached Employment Authorization
☐ 5. Alien Registration Card with photograph

Document Identification _____

Expiration Date (if any) _____

List B
Documents that Establish Identity

- ☒ 1. A State-issued driver's license or a State-issued I.D. card with a photograph, or information, including name, sex, date of birth, height, weight, and color of eyes. (Specify State) _____
☐ 2. U.S. Military Card
☐ 3. Other (Specify document and issuing authority) _____

Document Identification _____

Expiration Date (if any) _____

List C
Documents that Establish Employment Eligibility

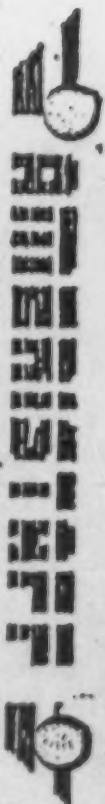
- ☐ 1. Original Social Security Number Card (other than a card stating it is not valid for employment)
☐ 2. A birth certificate issued by State, county, or municipal authority bearing a seal or other certification
☐ 3. Unexpired INS Employment Authorization Specify form # _____

Document Identification _____

Expiration Date (if any) _____

CERTIFICATION: I attest, under penalty of perjury, that I have examined the documents presented by the above individual, that they appear to be genuine and to relate to the individual named, and that the individual, to the best of my knowledge, is eligible to work in the United States.

Signature	Name (Print or Type)	Title
Employer Name	Address	
		Date



PERSONNEL CONTINUATIONS 170.

115 S. Jefferson Street Suite 304
Green Bay, WI 54301
(414) 435-4455
AN EQUAL OPPORTUNITY EMPLOYER

Elie Chiriclan
POSITION

Sept 7, 1989
DATE OF APPLICATION

NAME Hansen, Malcolm LAST FIRST MIDDLE
Harvey

481-46-9951
SOCIAL SECURITY NUMBER

PRESENT LOCAL ADDRESS _____

612-682-3667
AREA CODE TELEPHONE NUMBER

PERMANENT ADDRESS 805 ZND 902 50
Bafield Hall 2D 55363
(if different from above) _____

AREA CODE TELEPHONE NUMBER

DO YOU HAVE TRANSPORTATION? X YES NO
DATE OF BIRTH 4/4/39 HEIGHT 5'9" WEIGHT 242

DO YOU HAVE A VALID DRIVERS LICENSE? X YES NO
ARE YOU A CITIZEN OF THE U.S.? X YES NO

The Age Discrimination in Employment Act of 1967 prohibits discrimination upon the basis of age with respect to individuals who are at least forty (40) but less than seventy (70) years of age.

EMERGENCY NOTIFICATION

NAME Lois Carlson

RELATIONSHIP SISTER
218-326-6285
AREA CODE TELEPHONE NUMBER

ADDRESS 726 10th Ave West
Granby Appt 8 S. Minn.

PERSONAL DATA
Have you applied here previously? NO Have you been employed here previously? X YES NO
Have you ever been convicted of any crime, including drunk driving? (Exclude minor traffic and juvenile violations) NO YES X NO

Have you ever been hospitalized for, or treated for, problems relating to the use of alcohol and/or drugs? NO YES X NO
Do you now use habit forming drugs? NO YES X NO
Do you possess a mental or physical disability which might create a hazard to you or to others, which might require accommodations in the job you desire? (Ref. Sec. 503, Rehabilitation Act of 1973)? NO YES X NO If yes, please explain: _____

PHYSICAL INFORMATION

agv lt, operated on successfully

I have or have had:
Heart Disease X Heart None Back Injury None Dizziness None
Fracture None Sprain/Strain None Diabetes None Hearing Defect None Epilepsy None
Other: _____
I have been ill or under Doctor's care recently? NO YES X NO
I have received Workers' Compensation in the past 5 years? NO YES X NO

EDUCATION

Circle Highest Grade Completed in each school category	ELEMENTARY 1 2 3 4 5 6 7 8	and	HIGH SCHOOL 9 10 11 12	COLLEGE 0 2 3 4	GRAD SCHOOL 1 2 3 4	
TYPE OF SCHOOL	SCHOOL NAME AND LOCATION		YEARS ATTENDED	GRADUATED YES OR NO	LAST YEAR ATTENDED	MAJOR COURSE OR DEGREE
ELEMENTARY	Swatara, Minn		8	Yes	1953	
JUNIOR HIGH SCHOOL						
SENIOR HIGH SCHOOL	Boofm Junior High School 100 Squireman		4	Yes	1957	
COLLEGE	U of M St Paul			NO	1	agri
COMMERCIAL OR TRADE SCHOOL						
NIGHT OR CORRESPONDENCE SCHOOL						

U.S. MILITARY SERVICE? X YES NO From EPN 1 1957 to 1960
100th + 100th

SEP-21-1989

11:30

FROM

STAFF THANKS YOU

TO

ELEC. APPLE

P.07

Where did you first hear about Ameristaff? TV ☐ Radio ☐ Station ☐ Newspaper ☒ Other ☐

EMPLOYMENT RECORD FILL IN EVERY SPACE COMPLETELY

LIST ALL EMPLOYERS
BEGINNING WITH MOST RECENT

NAME	ADDRESS	CITY	PHONE	KIND OF BUSINESS		JOB TITLE	REASON FOR LEAVING
				TIME EMPLOYED MONTHS	HOURLY PAY		
SELF Employed	244 Ave 50	Buffalo, Minn.		Real Estate		C.E.O	still there
				FROM	STARTING		SKILLS - MACHINERY, TOOLS, ETC.
				TO	LEAVING		Farm, Removal Houses Rental Business etc.

NAME	ADDRESS	CITY	PHONE	KIND OF BUSINESS		JOB TITLE	REASON FOR LEAVING
				TIME EMPLOYED MONTHS	HOURLY PAY		
Sterling Electric	2936 Lyndale Ave	Mpls		Electrical		Elec	Rejection in favor
				FROM	STARTING		SKILLS - MACHINERY, TOOLS, ETC.
				TO	LEAVING		All tools in Electrical Business

NAME	ADDRESS	CITY	PHONE	KIND OF BUSINESS		JOB TITLE	REASON FOR LEAVING
				TIME EMPLOYED MONTHS	HOURLY PAY		
Collin Electric	St Paul			Electrical		Electrician	Finished
				FROM	STARTING		SKILLS - MACHINERY, TOOLS, ETC.
				TO	LEAVING		

NAME	ADDRESS	CITY	PHONE	KIND OF BUSINESS		JOB TITLE	REASON FOR LEAVING
				TIME EMPLOYED MONTHS	HOURLY PAY		
Hunt Electric	St. Paul			Electrical		Electrician	Finished
				FROM	STARTING		SKILLS - MACHINERY, TOOLS, ETC.
				TO	LEAVING		All tools Electrical Business

LIST ALL SKILLS THAT ARE APPLICABLE TO THE POSITION YOU ARE APPLYING FOR: welding, High voltage
line man operator

PREVIOUS SUPERVISORS

NAME AND TITLE	NAME AND TITLE
GARY SHARBAWSKI	Eugene Aislaue
Hunt Electric	Collins Electric
	Beckel on 'gapt

EMPLOYMENT CONDITIONS

Please Read Carefully Before Signing. Ask For Clarification If Needed.

In processing this employment application, AMERISTAFF may solicit information as to the applicant's character, general reputation, and personal characteristics. The applicant has the right to full disclosure of information requested by AMERISTAFF. In addition, AMERISTAFF is authorized to supply employment records, confidentially, to any prospective employer.

I CERTIFY that all statements made by me on this application are true and complete to the best of my knowledge and that I have withheld nothing that would, if disclosed, affect this application unfavorably. I understand that any false statement on this application is grounds for refusal to hire me, or grounds for discharge if I am hired.
 I HEREBY ACKNOWLEDGE that I have read the above statement and understand the same.

25

AMERISTAFF PERSONNEL
CONTRACTORS LTD.
POST OFFICE BOX 1392
GREEN BAY, WI 54305

AMERICAN STATE PERSONNEL

POST OFFICE BOX 41392
GREEN BAY WI 54305

25



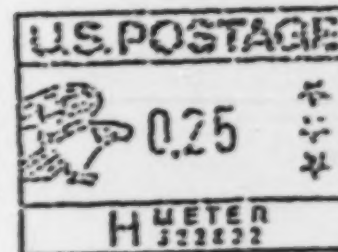
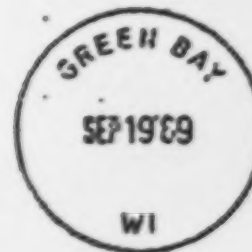
Cardinal-legate of the Roman Church

Case No. 18-CA-11035, 11044 Official Exhibit No. #6
and 11080 (Ct. Record, Party)
 Date: 12/12/89 Witness: [Signature] Reporter: [Signature]
 No. Pages: 2

200

AMERISTAFF
PERSONNEL CONTRACTORS LTD.

P.O. Box 1392
Green Bay, WI 54305
(414) 435-4455



Malcolm Hansen
805 2nd Avenue South
Buffalo, MN 55313



OBJECTS

The objects of the International Brotherhood of Electrical Workers are:

- To organize all workers in the entire electrical industry in the United States and Canada, including all those in public utilities and electrical manufacturing, into local unions,
 - To promote reasonable methods of work,
 - To cultivate feelings of friendship among those of our industry,
 - To settle all disputes between employers and employes by arbitration (if possible),
 - To assist each other in sickness or distress,
 - To secure employment,
 - To reduce the hours of daily labor,
 - To secure adequate pay for our work,
 - To seek a higher and higher standard of living,
 - To seek security for the individual,
 - And by legal and proper means to elevate the moral, intellectual and social conditions of our members, their families and dependents, in the interest of a higher standard of citizenship.
-
-

IBEW CONSTITUTION

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I.B.E.W. shall deposit the duplicate portion of the withdrawal card in the I.O. and pay his per capita in advance to the I.S., as well as any I.O. assessments, and he shall be entitled to all benefits of the I.B.E.W. as long as he complies with its laws and maintains his continuous good standing. The participating withdrawal card shall not entitle the holder to any L.U. benefits or admittance to any L.U. meeting. Upon returning to the trade, the recipient of this card shall deposit it in the L.U. which issued it. No member on participating withdrawal card is entitled to notice of any payments due the I.O.

Sec. 3. Any member not desiring to maintain his standing who retires from the trade or is unemployed, or in such other cases as may be decided by the L.U., may be issued an honorary withdrawal card provided dues are paid for the previous month or the current month if the application is made after the 15th of such month.

Upon returning to the trade, or again becoming employed, and having complied with this article, he shall deposit his withdrawal card in the L.U. that issued it and continue membership by paying the current month dues. No new initiation fee is necessary, except that any "A" member shall pay the two dollar (\$2.00) fee as required in Article X.

Sec. 4. "BA" members not employed under the jurisdiction of the L.U. for at least a month can be shown as on honorary withdrawal without actual issuance of the card, unless the L.U. bylaws provide otherwise. Officers of the L.U. are not entitled to withdrawal status without forfeiture of their office.

However a "BA" member, shown as on honorary withdrawal or on honorary withdrawal card not exceeding two (2) months, may retain his continuous good standing

in the L.U., and eligibility for local union office and as delegate to the I.C., by paying dues for the months of unemployment before becoming indebted to his L.U. for three (3) months' dues had he been employed.

Sec. 5. The validity of any withdrawal card shall be dependent upon the good conduct of the member. It can be annulled by any L.U. or by the I.P. for violation of the laws of the I.B.E.W., or the bylaws and rules of any L.U., or for working with or employing non-members of the I.B.E.W. to perform electrical work, or for any action of the holder detrimental to the interests of the I.B.E.W. Membership in the I.B.E.W. is automatically terminated upon annulment of any withdrawal card.

A member on a withdrawal card may be subject to charges, trial and appropriate penalty in accordance with provisions of this Constitution.

ARTICLE XXVII

MISCONDUCT, OFFENSES AND PENALTIES

Sec. 1. Any member may be penalized for committing any one or more of the following offenses:

(1) Violation of any provision of this Constitution and the rules herein, or the bylaws, working agreements, or rules of a L.U.

(2) Having knowledge of the violation of any provision of this Constitution, or the bylaws or rules of a L.U., yet failing to file charges against the offender or to notify the proper officers of the L.U.

(3) Obtaining membership through fraudulent means or by misrepresentation, either on the part of the member himself or others interested.

(4) Engaging in activities designed to bring about a withdrawal or secession from the I.B.E.W. of any L.U. or of any member or group of members, or to cause dual unionism or schism within the I.B.E.W.

(5) Engaging in any act or acts which are contrary to the member's responsibility toward the I.B.E.W., or any of its L.U.'s, as an institution, or which interfere with the performance by the I.B.E.W. or a L.U. with its legal or contractual obligations.

(6) Working for, or on behalf of, any employer, employer-supported organization, or other union, or the representatives of any of the foregoing, whose position is adverse or detrimental to the I.B.E.W.

(7) Wronging a member of the I.B.E.W. by any act or acts (other than the expression of views or opinions) causing him physical or economic harm.

(8) Entering or being present at any meeting of a L.U., or its Executive Board, or any committee meeting while intoxicated, or drinking intoxicants in or near any such meeting, or carrying intoxicants into such meeting.

(9) Disturbing the peace or harmony of any L.U. meeting or meeting of its Executive Board, using abusive language, creating or participating in any disturbance, drinking intoxicants, or being intoxicated, in or around the office or headquarters of a L.U.

(10) Making known the business of a L.U., directly or indirectly, to any employer, employer-supported organization, or other union, or to the representatives of any of the foregoing.

(11) Fraudulently receiving or misappropriating any moneys of a L.U. or the I.B.E.W.

(12) Causing or engaging in unauthorized work stop-

pages or strikes or other violation of the laws and rules of the I.B.E.W. or its L.U.'s.

(13) Wilfully committing fraud in connection with voting for candidates for L.U. office, or for delegates to conventions.

(It shall not be considered an offense when a L.U. mails out—or posts in a conspicuous place—a sample of the official ballot to be used in any L.U. election. However, the sample shall not carry any markings of any kind—except that the word "SAMPLE" shall appear prominently across the face of the ballot. The sample shall otherwise be an exact duplicate of the official ballot to be used.)

(A) Notwithstanding the above, and in addition to the sample ballot, a L.U. may distribute an official publication which shall list all candidates for L.U. office, together with a factual record of activities within the L.U., committee assignments performed, offices held and experience gained for and in behalf of the L.U. This publication shall be prepared under the supervision of the duly designated L.U. Election Board.

(B) The distribution of this official L.U. publication, properly prepared as set forth above, shall not be in violation of Article XVIII, Section 20.

(14) Soliciting advertising for yearbooks, programs, etc., when the name of a L.U. or the I.B.E.W., or the names or pictures of L.U. or International Officers appear in such matter without consent of the I.P. Any member, any officer or representative of any L.U., or other organization coming under the I.B.E.W.'s jurisdiction, shall be held liable for allowing individuals or agencies to solicit such advertising without consent of the I.P. or for in any way violating this provision.

(15) Failure to install or do his work in a safe, workmanlike manner, or leaving work in a condition that may endanger the lives or property of others, or proving unable or unfit mentally, to learn properly his trade.

(16) Causing a stoppage of work because of any alleged grievance or dispute without having consent of the L.U. or its proper officers.

(17) Working for any individual or company declared in difficulty with a L.U. or the I.B.E.W., in accordance with this Constitution.

(18) Wilfully committing fraud in connection with obtaining or furnishing credentials for delegates to the I.C. or being connected with any fraud in voting during the I.C.

(19) Allowing another person to use, or altering in any manner, his membership card, receipt, or other evidence of membership in the I.B.E.W.

Any member convicted of any one or more of the above-named offenses may be assessed or suspended, or both, or expelled.

If an officer or representative of a L.U. is convicted of any one or more of the above-named offenses, he may be removed from office or position, or assessed or suspended, or both, or expelled.

Charges and Trials

Sec. 2. All charges, except against officers and representatives of L.U.'s, shall be heard and tried by the L.U. Executive Board which shall act as the trial board in accordance with Article XIX. A majority vote of the board shall be sufficient for decision and sentence.

(This section shall not be construed to conflict with power of the I.P. or the I.E.C. to take action in certain cases as provided in Articles IV and IX.)

Sec. 3. All charges against a member or members must be presented in writing, signed by the charging party, and specify the section or sections of this Constitution, the bylaws, rules or working agreement allegedly violated. The charges must state the act or acts considered to be in violation, including approximate relevant dates or places.

Sec. 4. Charges against members must be submitted to the R.S. of the L.U. in whose jurisdiction the alleged act or acts took place within sixty (60) days of the time the charging party first became aware, or reasonably should have been aware, of the alleged act or acts. The charges shall be read out but not discussed at the next regular meeting of the L.U. following the filing of the charges. The R.S. shall immediately send a copy of such charges to the accused member at his last known address together with written notice of the time and place he shall appear before the trial board.

Sec. 5. The trial board shall proceed with the case not later than forty-five (45) days from the date the charges were filed. The board shall grant a reasonable delay to the accused when it feels the facts or circumstances warrant such a delay. The accused shall be granted a fair and impartial trial. He must, upon request, be allowed an I.B.E.W. member to represent him.

Sec. 6. When the trial board has reached a decision, it shall report its findings, and sentence, if any, to the next regular meeting of the L.U. Such report or action of the board shall not be discussed or acted upon by the L.U. The action of the trial board shall be considered the

action of the L.U., and the report of the board shall conclude the case, or cases, except for the accused having the right to appeal to the I.V.P., then to the I.P., then to the I.E.C. and then to the I.C. However, the board may reopen and reconsider any case or cases when it feels the facts or circumstances justify doing so anytime within thirty (30) days from the date decision was rendered. The board shall reopen any case or cases when directed to do so by the I.V.P. or the I.P.

Sec. 7. If the accused wilfully fails to stand trial—or attempts to evade trial—the trial board shall proceed to hear and determine the case just as though the accused were present.

Trials of Officers and Representatives

Sec. 8. All charges against an officer or representative of a L.U. must be presented in writing, signed by the charging party, and specify the section or sections of this Constitution, the bylaws, rules or working agreement violated. The charges must state the act or acts considered to be in violation, including approximate relevant dates and places; and must be made within sixty (60) days of the time the charging party first became aware, or reasonably should have been aware, of the alleged act or acts.

Such charges must be filed with the I.V.P. in whose district the L.U. is located where the alleged act or acts took place, or as directed by the I.P., should more than one district be involved. However, if such charges are against an officer or representative of a railroad L.U., or an officer, general chairman or representative of a Railroad Council, these shall be filed with the I.V.P. in charge of railroad matters.

(This section shall not be construed to conflict with power of the I.P. or the I.E.C. to take action in certain cases as provided in Articles IV and IX.)

Sec. 9. The I.V.P. shall pass upon and determine such cases, with the accused having the right of appeal to the I.P., then to the I.E.C., then to the I.C. Any such appeal, to be recognized, must be made within thirty (30) days from the date of the decision appealed from. No appeal from the I.V.P. shall suspend operation of any decision.

Sec. 10. The I.V.P. may require that all evidence, testimony, or statements be submitted to him in writing for review, decision and sentence (if any) or he may hear the case in person. If he so decides, he may appoint a referee, who may or may not be a member, to take testimony and report to him.

Sec. 11. The I.V.P. may reopen any case or cases when there is new evidence or testimony, facts or circumstances, which he feels are sufficient to justify such being done.

Appeals

Sec. 12. Any member who claims an injustice has been done him by any L.U. or trial board, or by any Railroad Council, may appeal to the I.V.P. any time within forty-five (45) days after the date of the action complained of. If the appeal is from an action of a railroad local union, or a Railroad Council, it must go to the I.V.P. in charge of railroad matters.

A copy of any appeal must be filed with the L.U., or with the Railroad Council, as the case may be.

Sec. 13. No appeal for revocation of an assessment shall be recognized unless the member has first paid the

assessment, which he can do under protest. When the assessment exceeds fifty dollars (\$50.00), payments of not less than forty dollars (\$40.00) in monthly installments must be made until the assessment is paid or until a final decision on the appeal is made, whichever occurs first. The first monthly installment must be made within fifteen (15) days from the date of the decision rendered and monthly installments continued thereafter or the appeal will not be considered.

Sec. 14. When a decision has been rendered by the I.V.P. it shall become effective immediately.

Sec. 15. No appeals from decisions of the I.V.P., or from the I.P., or from the I.E.C., shall be recognized unless the party or parties appealing have complied with the decision from which they have appealed. However, this section may be waived by the party making the decision if good and sufficient reasons are furnished and he is requested to do so.

Sec. 16. Appeals to the I.P. and to the I.E.C., and to the Convention, to be considered, must be made within thirty (30) days from the date of the decision appealed from. (Appeals to the I.E.C. and to Conventions must be filed with the I.S.) If no appeal is made within thirty (30) days from the date that any decision is rendered, such decisions shall be considered final.

Sec. 17. Any member penalized or otherwise disciplined for an offense may appeal.

Sec. 18. When an appeal is taken above the I.V.P., only the evidence submitted in the original case of appeal shall be considered.

In cases where parties claim they have new and important evidence affecting a case in which decision has

ART. 27

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been rendered, they may submit this within thirty (30) days to the authority who rendered the first decision, with a request that the case be reopened. Such authority shall decide whether the matter submitted justifies reopening the case.

ARTICLE XXVIII

JURISDICTION

Sec. 1. The charter issued this organization by the American Federation of Labor states that it was granted "for the purpose of a thorough organization of the trade."

There must be a systematized knowledge of the science of electricity in all of its various applications of electron transfer and electromagnetism. This requires a thorough understanding of the many means of production, transference, control and utilization of electricity and of the foundation or preparatory work to be performed. It is quite necessary, therefore, that the jurisdiction of the I.B.E.W. be recognized as one covering:

(a) The manufacture, assembling, construction, installation or erection, repair or maintenance of all materials, equipment, apparatus and appliances required in the production of electricity and its effects.

(b) The operation, inspection and supervisors of all electrical equipment, apparatus, appliances, or devices by which the energy known as electricity is generated, utilized and controlled.

Sec. 2. Electrical workers shall be organized under five general branches of the I.B.E.W., namely: Outside and Utility Workers; Inside Electrical Workers; Communications Workers; Railroad Electrical Workers and Electrical Manufacturing Workers.

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ART. 28

JOB SALTING
ORGANIZING RESOLUTION

256

- WHEREAS: Local Union # 292 is committed to organizing all unorganized craftsmen working in our jurisdiction, and;
- WHEREAS: A continual organizing program is the lifeblood of all building and construction trades unions because it is the only proven method of maintaining control of the construction labor pool, and;
- WHEREAS: The first obligation of the members of the local union is to organize the unorganized in order to maintain and secure our wages, benefits, and other conditions of employment, and;
- WHEREAS: The success of any organizing drive depends upon the support of each and every union craftsman, both on and off the job; therefore, be it
- RESOLVED: That the Business Manager be empowered to authorize members to seek employment by nonsignatory contractors for the purpose of organizing the unorganized, and be it further
- RESOLVED: That unemployed members shall report to the Business Manager for the purpose of assisting as needed in the organizing program, and be it further
- RESOLVED: That the Business Manager shall maintain records of all members authorized to seek employment by nonsignatory employers including date (s) of authorization, date (s) of employment., and all other pertinent information, and be it further
- RESOLVED: That such members, when employed by nonsignatory employers, shall maintain their position (s) on the out-of-work list, and be it further
- RESOLVED: That such members, when employed by nonsignatory employers, shall promptly and diligently carry out their organizing assignments, and leave the employer or job immediately upon notification, and be it further
- RESOLVED: That any member accepting employment by a nonsignatory employer, except as authorized by this RESOLUTION, shall be subject to charges and discipline as provided by our Constitution and Bylaws.

Adopted by the Local Union and entered into the minutes of the membership meeting this 14th day of June, 1988.

Samuel Clark
RECORDING SECRETARY

R4(c)



JOHN J. SLIPP JR.
BUSINESS MANAGER
FINANCIAL SECRETARY

LOCAL UNION 343

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS

I B E W

P.O. Box 166
ROOM 305, WULFENBACH SQUARE, LESLIE, MINNESOTA 55056

TELEPHONE: (612) 685-4448

257

RESOLUTION

WHEREAS: The I.B.E.W., Local Union 343 is committed to organizing all unorganized craftsmen working in our jurisdiction, and

WHEREAS: A continual organizing program is the lifeblood of all building and construction trades unions because it is the only proven method of maintaining control of the construction labor pool, and

WHEREAS: The first obligation of the members of this local union is to organize the unorganized in order to maintain and secure our wages, benefits, and other conditions of employment, and

WHEREAS: The success of any organizing drive depends upon the support of each and every union craftsman, both on and off the job; therefore; be it

RESOLVED: The the Business Manager and/or Assistant be empowered to authorize members to seek employment by nonsignatory contractors for the purpose of organizing the unorganized, and be it further

RESOLVED: That unemployed members shall report to the Business Manager and/or Assistant for the purpose of assisting as needed in the organizing program, and be it further

RESOLVED: That the Business Manager and/or Assistant shall maintain records of all members authorized to seek employment by nonsignatory employers including date(s) of authorization, date(s) of employment, and all other pertinent information, and be it further

RESOLVED: That such members, when employed by nonsignatory employers, shall maintain their position(s) on the out-of-work list, and be it further

RESOLVED: That such members, when employed by nonsignatory employers, shall promptly and diligently carry out their organizing assignments, and leave the employer or job immediately upon notification, and be it further



R4e)

4E

W.R. #5



JOHN J. SLIPY JR.
BUSINESS MANAGER
FINANCIAL SECRETARY

LOCAL UNION 34

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKER

IBEW

P.O. BOX 166
ROOM 305, VALLEYGREEN SQUARE, LESUEUR, MINNESOTA 56058

TELEPHONE: (612) 865-64

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page 2

RESOLVED: That any member accepting employment by a nonsignatory employer, except as authorized by this RESOLUTION, shall be subject to charges and discipline as provided by our Constitution and By-Laws, and be it further

RESOLVED: That during such employment an amount equal to the monthly charge for our health care be forwarded in his name to pay his monthly premium. This sum will be taken out of the Local Union General Fund.

Submitted by,

John J. Slipy, Jr.
Business Manager
Local Union 343, I.B.E.W.



**INTERNATIONAL BROTHERHOOD OF
ELECTRICAL WORKERS**

LOCAL 292
312 CENTRAL AVE., SUITE 292
MINNEAPOLIS, MN 55414

UNION BANK AND TRUST
MINNEAPOLIS, MN 55414

PAYROLL ACCOUNT

17-131/910

SORT NO. **013617**

CHECK NO.

CHECK DATE

013617

09/29/89

373191378 7348 00 10-03-89 1 3

ONE THOUSAND NINETY ONE AND 82/100 DOLLARS

PAY TO THE ORDER OF:

CHECK AMOUNT *****1091.82**

MALCOLM H. HANSEN
805 - 2ND AVENUE SOUTH
BUFFALO MN 55313

James L. Liden
Michael J. Quinn

⑈013617⑈ ⑆091001319⑆ ⑆10015400⑈

⑈0000109182⑈

CASE NO.

1829-11035, 11044
and 11680

OFFICE OF THE
TREASURER

Dependent's #9

✓

DATE:

BY:

REPORTER:

12/29/89
Turn & Country
Buffalo

No. Pages: 1

NO. _____

DAILY FOREMAN'S DIARY

REPORT NO. _____

DATE SEPT. 12, 1989

WEATHER _____

TEMPERATURE _____

JOB BOISE CASCADEJOB NO. 6000LOCATION INT. FALLS MN.

260

NUMBER AND TYPES OF MEN WORKING	CHECK-IN/OUT TIME	OTHER MAJOR CONTRACTORS ON JOB
GENERAL FOREMAN		
FOREMAN		
JOURNEYMAN		
APPRENTICES		
ELECTRICAL ASSISTANTS		
LABORERS		

TYPE OF WORK IN PROCESS: PRIMARY FEEDER FOR WELAND TEST ROOM & START RACKS FOR DISCONNECTS.

HINDERANCE TO JOB PROGRESS AND BY WHOM: VISITS BY BOB JOHNSON & GORDON OSLIN FORCED ME TO SEND MIKE GROW OUT OF THE MILL FOR AWHILE. THE MILL, INFORMATION THAT SOMEONE COULD WORK ON BRACKETS & STUFF WITH OUT MINN'S SUPERVISION WAS INCORRECT. SPECIAL MATERIALS RECEIVED AND MATERIAL PROBLEMS: BOTH INSPECTORS WERE VERY PLEASE AND WILLING TO WORK WITH US. MR. JOHNSON STATED THAT THERE CIRCUMSTANCES GET A BIT STRANGE AND THAT THE INSPECTORS WERE GOING TO BE A LOT MORE FREQUENT THAN NORMAL SPECIAL VISITORS OR PHONE CALLS OF IMPORTANCE TO US: D.W. "DON" NELSON (BRANCH MANAGER) & STEVE JOHNS (AREA SALESMAN) FOR GRAYBAR STOPPED IN TODAY

TOOLS AND PARTS TRANSFERRED, STOLEN, MISPLACED OR LOST: _____

NUMBER & TYPES OF RENTAL EQUIPMENT ON JOB: _____

COMMENTS: MALCOLM HANSON DOES NOT COME CLOSE TO BEING SATISFACTORY IN THE PRODUCTION END.

SIGNATURE

DATE: Sept. 12, 1989

DAILY FOREMAN'S REPORT

NO. _____

REPORT NO. _____

JOB Boise CASCADE

DATE SEPT. 13, 1989

JOB NO. 6000

WEATHER _____

LOCATION Int Falls MN

TEMPERATURE _____

NUMBER AND TYPES OF MEN WORKING	CHECK-IN/OUT TIME	OTHER MAJOR CONTRACTORS ON JOB
GENERAL FOREMAN		
FOREMAN		
JOURNEYMAN		
APPRENTICES		
ELECTRICAL ASSISTANTS		
LABORERS		

TYPE OF WORK IN PROCESS: Primary feeder conduit Run Hase 15KV
TRANSFORMER, & WORK ON DISCONNECT RACKS

HINDERANCE TO JOB PROGRESS AND BY WHOM: MIKE GEOW STILL HAS NOT RECEIVED
MY LETTER OF ACCEPTANCE FROM THE STATE OF MN. HE WROTE
FOR 1 HOUR TODAY CHASING PARTS DOWN IN THE CITY.

SPECIAL MATERIALS RECEIVED AND MATERIAL PROBLEMS: THEY (B.C.) DOES NOT HAVE ANY
SCREWS HOEGER THAT 1 1/2" IN DIAMETER TWENTY SIZE
MIKE WROTE TO A WHOLESALE HOUSE TO BUY SOME
THEY DID NOT HAVE ANY EITHER. HE ENDED UP AT ACB HUB.
SPECIAL VICTIMS ON PHONE CALLS OF IMPROPER TO GO. WHERE HE WROTE OUT THEIR FOR

TOOLS AND PARTS TRANSFERRED, STOLEN, MISPLACED OR LOST: _____

NUMBER & TYPES OF RENTAL EQUIPMENT ON JOB: _____

COMMENTS: Malcolm Hanson is
A POLYMIC TALKER. I wish I
COULD CHANNEL THE ENERGY HE PUTS
INTO TALKING INTO PRODUCTIVE WORK.
As of His Talking is slowing

[Signature]
SIGNATURE

DAILY FOREMAN'S REPORT

NO. _____ REPORT NO. _____ DATE 9/14/89

JOB BOISE CASCADE WEATHER _____

JOB NO. 6000 TEMPERATURE _____

LOCATION INT. FALLS MN

NUMBER AND TYPES OF MEN WORKING	CHECK-IN/OUT TIME	OTHER MAJOR CONTRACTORS ON JOB
GENERAL FOREMAN		
FOREMAN		
JOURNEYMAN		
APPRENTICES		
ELECTRICAL ASSISTANTS		
LABORERS		

TYPE OF WORK IN PROCESS: RUN CONDUIT IN LUNCHROOM, HANG CONDUIT. STARTED AND WELDER DISCONNECTS, START PIPING, HANG MAIN DISCONNECT FOR WELDERS & 120V PANEL.

~~HANDS ON TO JOB PROGRESS AND REPORT.~~ ON THE UP BEAT MIKE GROW RECEIVED HIS LETTER OF ACCEPTANCE FOR TESTING FOR HIS JOURNEYMANS LICENSE LATE LAST NITE. WITH THE ADDITION OF MIKE AND THE SUPREMO EFFORTS OF TOM & RANDY IN SPECIAL MATERIALS RECEIVED AND MATERIAL PROBLEMS. ACTUALLY LOOKS LIKE WE ACCOMPLISHED SOMETHING TODAY

SPECIAL VISITORS OR PHONE CALLS OF IMPORTANCE TO US: MET WITH LARRY KINGERY (FLOR DANIEL) & FRANK (BOISE CASCADE) TODAY AND DID A WALK THROU OF DS 25 & DS 26 REPLACEMENT. JOHN WALDEN OF NORTHEN Elec. SUPPLY STOPPED IN & INTRODUCED HIMSELF TODAY. TOOK AND PARTS TRANSFERRED. STOLEN MISPLACED OR LOST: THE MIL GEORGE ARNISON ORDERED THE CORRECT PANEL FOR THE 120V TODAY. THEY ALSO STARTED MAKING THE GUTTER FOR ABOUT WELAND DISCONNECTS

NUMBER & TYPES OF RENTAL EQUIPMENT ON JOB: _____

COMMENTS: Malcolm Hanson did inspect the quantity of work he did today. He did not live up to our expectations. And he still spends to much time B.S. INC WITH MILL EMPLOYEES AND

Boyd J. Hanson
SIGNATURE

11/1/89 R. S. O. 11/1/89

DAILY FOREMAN'S DIARY

NO. _____

REPORT NO. _____

JOB Boise Cascade

DATE 9/15/89

JOB NO. 6000

WEATHER Clear & Sunny

LOCATION Int. Falls Mn.

TEMPERATURE 75°

NUMBER AND TYPES OF MEN WORKING	CHECK-IN/OUT TIME	OTHER MAJOR CONTRACTORS ON JOB
GENERAL FOREMAN		
FOREMAN		
JOURNEYMAN		
APPRENTICES		
ELECTRICAL ASSISTANTS		
LABORERS		

TYPE OF WORK IN PROCESS: Lunch Room, Welder Rack, Comb. Storages, 120V Panel look like we can put wires down Monday.
We will still have lites & recepts to do in main area
and office

HINDERANCE TO JOB PROGRESS AND BY WHOM: _____

SPECIAL MATERIALS RECEIVED AND MATERIAL PROBLEMS: _____

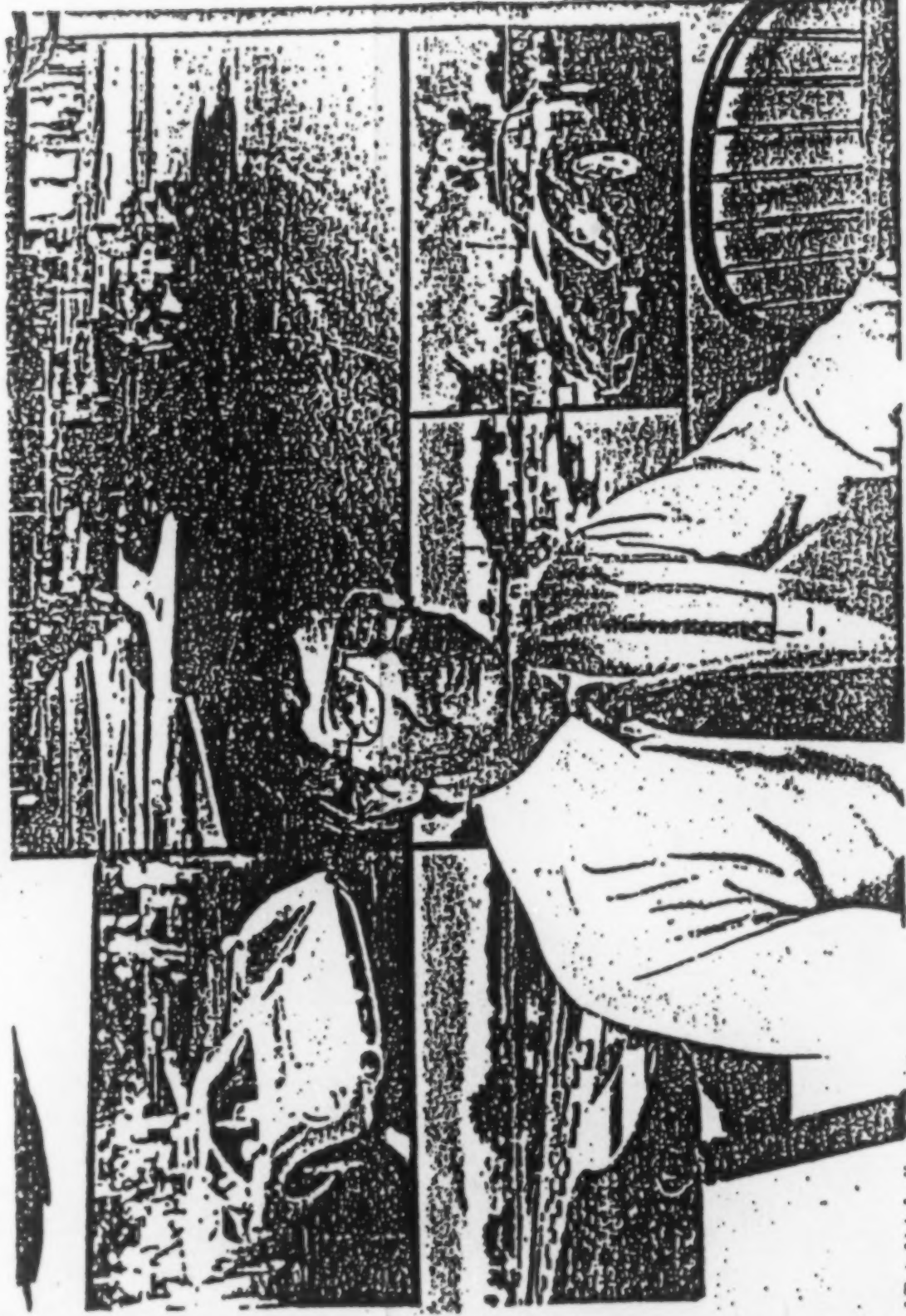
SPECIAL VISITORS OR PHONE CALLS OF IMPORTANCE TO US: _____

TOOLS AND PARTS TRANSFERRED, STOLEN, MISPLACED OR LOST: _____

NUMBER & TYPES OF RENTAL EQUIPMENT ON JOB: _____

COMMENTS: Without Maccom Around this
crews spirit has rebound! Fantastic
Progress today

[Signature]
 SIGNATURE



The Open and Closed Case of Town & Country Electric

*A non-union contractor thrives in the Fox Valley;
progressive management is how; Do merit shops export jobs?*

BY BOB LOWE

THERE'S AN ADAGE IN BUSINESS that goes: "Companies get the unions they deserve." A corollary to that creed might be: "In a well-managed company, unions become obsolete." Town & Country Electric Inc., a non-union electrical contractor based in Appleton, may best exemplify

the truth of that corollary. People inside and outside the firm describe T&C as a model of progressive management philosophy.

Detractors — primarily members of Local 577 of the International Brotherhood of Electrical Workers (IBEW) — have a different assessment of

the company. To them, T&C represents a disturbing trend in the construction industry to hire non-union contractors. They charge these so-called "open shop" or "merit" contractors with instituting substandard wages, lowering the quality of craftsmanship, and promoting a decline in the American standard of living.

Roland Stephenson, founder of Town & Country Electric, Inc., Appleton, is also a vintage automobile racing buff. The photo collage in Stephenson's office includes his 1964 Shelby Cobra.

C.P.E.x.1

One thing is certain: Merit shops have more than just a foothold in the construction industry. In the last decade, open shop construction has soared from a 40 percent market share to 75 percent, according to Associated Builders & Contractors, a trade association for open shop contractors. Although ABC of Wisconsin doesn't keep a breakdown by region, merit shops are strongest in the Fox Valley and central Wisconsin while Milwaukee, Madison, Green Bay and La Crosse are more heavily unionized, membership director John Meyer says. "And our membership keeps growing every year," he adds.

Seventeen years after its founding by Roland Stephenson, T&C has grown to become the largest open shop electrical contractor in the state. And Stephenson, its president and treasurer, says the company is poised to become the leading electrical contractor in the Midwest.

T&C sprang from the womb of Stephenson Electric Co., a union electrical contractor founded in 1952 by Stephenson's father, Clyde. Both Roland, 43, and his younger brother, Robert, 41, worked for their dad. In the 1970s, Stephenson Electric began to lose a considerable share of the smaller projects to upstart non-union contractors. Seeing the handwriting on the wall, the elder Stephenson advised his sons to get out of the business and find another line of work. Roland had another idea: form a non-union electrical contracting firm and compete with the open shop contractors.

Thus T&C was created, in the beginning, to acquire some of the electrical wiring work on apartments, homes and small metal buildings that the open shop firms were gobbling up. The company prospered far beyond Stephenson's most ambitious expectations.

Stephenson Electric was sold in 1982 to Heitpas Inc., a mechanical contractor from Little Chute. Robert went to work for Heitpas and Roland continued to develop his fledgling company. When Heitpas, which was a union contractor, went out of business in 1985, Robert came to work for T&C, bringing with him some clients he had cultivated while working in the industrial sector for Heitpas. These industrial accounts helped fuel the surge in growth that T&C experienced over the next four years.

From a two-person outfit in 1972 doing about \$140,000 in sales that first year, T&C has grown to 200 employees and \$12.9 million in sales in 1988, with branch offices in Milwaukee, Green Bay and Madison. Before the year is out, Stevens Point will be added to that list.

Among the projects T&C has completed in the Fox Valley are the Paper Valley Hotel and Conference Center and The Avenue Mall in Appleton, the Outagamie

County Airport, and additions and remodeling to Kimberly-Clark's home office and product testing facilities in Neenah. Outside the Badger State, the company has completed projects in North and South Dakota, Michigan, Iowa, Minnesota, Illinois, North Carolina and Virginia.

Its list of accounts is as impressive as it is long: Mercury Marine, Quad/Graphics, Boldt Construction Co., the Kohler Co. and Hammermill's Thilmany Pulp and Paper, among them. Stephenson considers each contract to be a long-term relationship with the client. "We offer our customers quality service at a fair price," Stephenson says. "Our goal is to determine our customers' needs and then provide them with an electrical distribution system to match those requirements." One indication that philosophy works is that T&C has retained most of its original clients, and repeat business is good.

Its success has made T&C a target of the IBEW. Union electricians show up to picket job sites where T&C crews are working. Their aim is informational, but the union hopes other union contractors will refuse to cross the picket line, creating a work stoppage, which is what happened at Eastern Airlines.

To counter those tactics, T&C incorporates a performance clause in contracts — signed by the union contractor — that protects the owner against strikes or work stoppages, lack of material or manpower. If a work stoppage occurs, the contractor has 24 hours to get people back on the job or default on the contract. The contractor is then responsible for finding a replacement to finish the job and any additional costs that involves.

Robert Stephenson says the company can work harmoniously with unions and sometimes even subcontracts out work to union electrical contractors. Through performance clauses and other contractual arrangements, he says an open shop contractor can work with a union contractor without work stoppages or picketing. Besides waging a public relations campaign to discourage firms from contracting with Town & Country, the IBEW has mounted a relentless — and, so far, unsuccessful — effort to unionize T&C electricians.

Employee turnover at the company is low. About 20 percent of the firm's 175 electricians come from the union ranks. "I wasn't too sure about the workmanship I would find, but I was pleasantly surprised," says Jim Schreiter, 45, of Appleton, who worked as a union electrician for 22 years before joining T&C four years ago. "The work they do is first class."

Having served as vice president of Local 577 and a member of its executive board,

Schreiter is in a good position to judge. "I don't want to get into a fighting match with the union," he says, "but I know I'm better off here. I probably have more benefits with T&C. I have profit-sharing and a 401(k) plan, which the union doesn't offer, and the health benefits are better. We have paid vacations and paid holidays."

Ronald Hansen, business manager of Local 577, concedes that open shop companies like T&C have hurt the electricians' union. "We don't want to see our industry destroyed. We set the standard through arbitration that benefits the workers and the community," he says. "If we lose ground, the non-union contractors will set whatever wages they like, and the checks and balances will be gone."

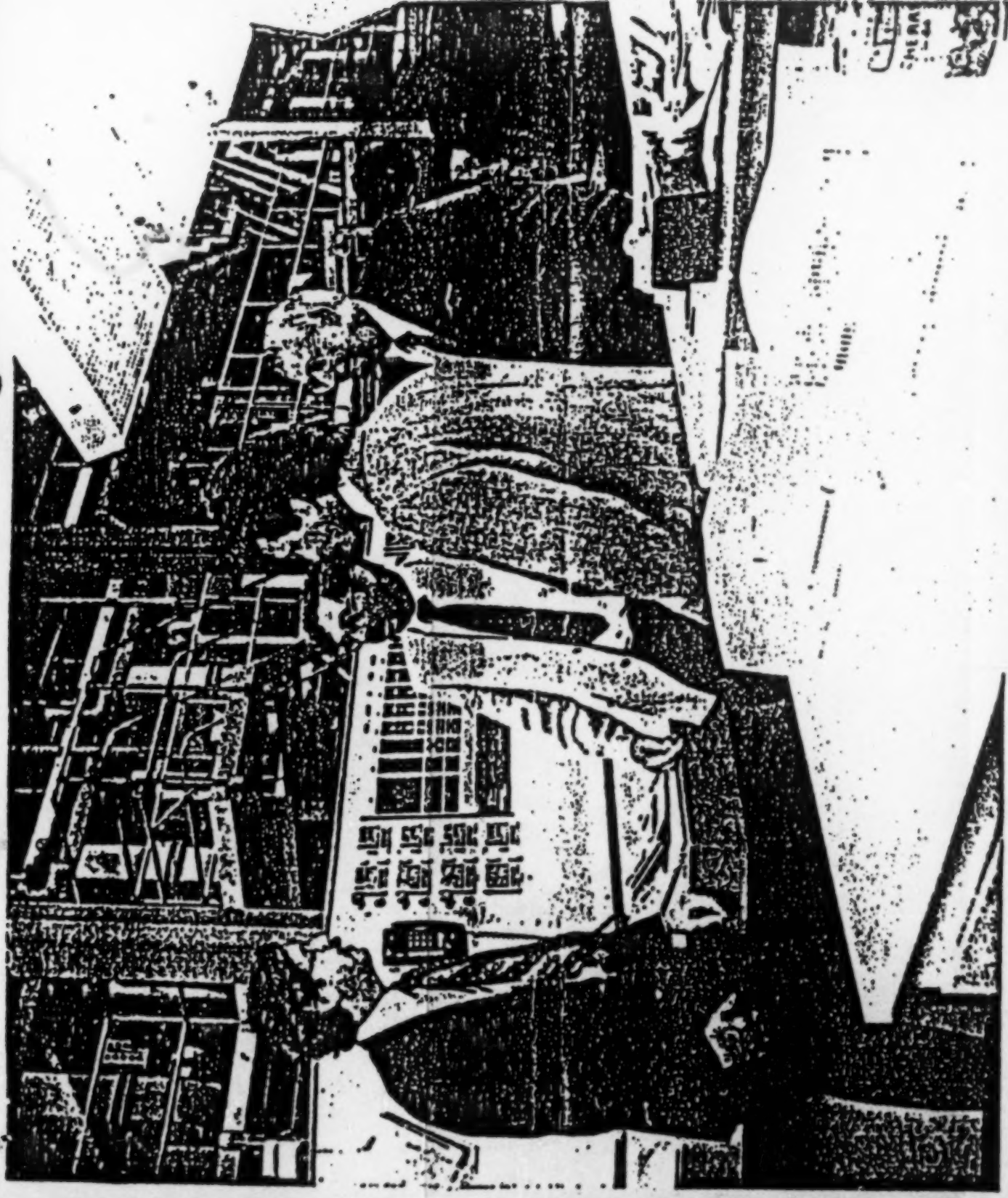
"If we get priced out of the market," adds Roger Perkins, business agent with Local 577, "the standard of living in the community is going to drop."

THE BULK OF T&C'S WORKLOAD — 60 to 65 percent — consists of large industrial projects: rebuilding paper machines and installing direct control drives, programmable logic controls and computerized technologies, including robotics and fiber optic systems. Commercial, municipal and institutional work, such as hotels, schools, offices, hospitals, malls and sewage treatment plants, account for 30 to 35 percent of revenue. Less than \$1 million a year comes from residential construction and service work.

The company's five-year plan envisions further expansion in three more Midwestern states. By the end of this year, annual sales are expected to exceed \$14 million.

The man who drives T&C, Rolie Stephenson, hardly fits the stereotype of the hard-charging, blue collar, mud-on-the-shoes hard hat seen at construction sites. Rather, he is a disarmingly friendly, unassuming man who speaks like a bookish scholar or laboratory technician. And, indeed, during his years at Marquette from 1964 to '68, Stephenson majored in chemistry and philosophy, but switched to electrical engineering. He has been variously described as "a dreamer, a visionary," and someone who "seems more like a poet-philosopher-scientist." A large framed portrait of Albert Einstein adorns his office wall.

Somewhat of a renegade, he left Marquette two semesters short of graduation to go to Alaska with a friend in search of adventure. He found a job working for Brinker Hoff Drilling Co. and later became chief electrician for British Petroleum. Stricken with homesickness, however, he returned to the Fox Cities. Motivated, he says, not by money or



Roland Stephenson, president of Town & Country Electric, Inc., leads a tour at one of the company's recent projects. Members of T & C's management cadre include (from left) Roland and three company vice presidents: his brother, Robert, Richard A. Schinke Jr., and David G. Berry.

status, Stephenson sees the company as a vehicle for implementing a progressive social philosophy that emphasizes the human element. He works quietly behind the scenes to promote socially worthwhile causes, serving on the board of directors for the Center for the Victims of Domestic Abuse and participating in fund raising for the Optimists Club and Goodwill Industries. Through T&C, he has donated labor and materials to a number of community projects.

He has a soft spot for military veterans. His father and grandfather fought in World Wars. His dad was at Pearl Harbor when it was bombed in 1941. Two uncles were killed in World War II and brother Robert served in Vietnam. For its commitment to veterans, T&C is one of 33 companies that received a special award from the U.S. Department of Labor in 1986.

Stephenson's role models are neither Donald Trump nor Lee Iacocca. Instead, he cites Mother Theresa, Martin Luther

King Jr. and Mahatma Gandhi — "people who were willing to put aside material things to exalt the greatness of people."

"Anything an employee can do to make this company more successful," he says, "we should try to make that employee more successful. At the same time, I tell my people we should always strive to make the clients more successful. I want to share the company with the people."

This he does in a variety of ways. Within a year after the company was founded, Stephenson made stock in the company available to all employees, a policy that exists today. "I believe in getting people involved, getting them to be part of the action and giving them something back. I want the people to share in the good news as well as the bad news."

Though he is a hands-on manager who sheds his pinstripes to get out in the field at least once a week, he is also careful to delegate authority. The key officers in the

corporation below him are his brother, Robert, and Richard A. Schinke Jr., both of whom are vice president of operations and share the responsibility for monitoring the field supervisors. David G. Berry, executive vice president and secretary, handles most of the financial duties, particularly payroll and benefits.

Education is a priority. After completing apprenticeship training, journeymen electricians are required — at company expense — to take an evening course at Fox Valley Technical College once a year to keep current with changing and emerging technologies. More than \$1 million has been invested in employee training.

Management uses newsletters, memos, group meetings and seminars to keep up a constant stream of communication with its workers. Teamwork is stressed. Safety courses and unannounced safety inspections are conducted periodically. Each

year, a survey is conducted to find out what employee concerns are and what suggestions they might have to improve operations. As a result of a recent survey, improvements in employees' vacation package and disability compensation have been incorporated in the company's fringe benefit package.

WORKERS ARE PAID A base rate supplemented with pay based on performance. Project managers are given the latitude to operate an assignment as if it were their own business.

IBEW's Perkins says the union offers some of these benefits and other incentives that he believes are better. Unlike their unionized counterparts, T&C's journeymen must purchase their own power tools. The company estimates the cost of tools to be \$500, but Perkins says it can run \$1,000 or higher. However, union dues — which cost \$978 for an employee making \$35,320 a year — makes it a wash.

Although the starting wage for T&C journeymen electricians ranges from \$13.60 to \$15.20 an hour compared to an average \$17.66 for their unionized counterparts, that gap narrows considerably when other factors are taken into consideration.

Hans Hansen Furniture Executive Interiors

Taste,
good design
and quality
don't have to
cost a fortune . . .
we've demonstrated
that for over
27 years.

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Brookfield: Galleria West Mequon: The Pavilion at Racine: 1945 North Hwy 31,
Shopping Center, 18920 W. Mequon, IL43 and Mequon Just South of Jct. with Hwy. 38
Bluemound Rd. • (414) 796-0055 Road • (414) 241-5588 Telephone (414) 633-6345
All Stores open Thursday evening 'till 8 P.M.

As for the union's claim that merit shops pay substandard wages, "I don't consider \$14, \$15 or \$16 an hour, coupled with vacations, health and dental insurance and other fringe benefits to be substandard," human resource manager Ron Sager says.

Also, T&C moves people to localities 30 or 40 miles around, enabling them to work 2,080 hours a year. Union electricians must report to the local labor hall, which acts as a placement center. They sign up and hope there's work available. Many times, jobs don't exist and they have to travel outside their jurisdiction.

"Unless there is a major project going on in town, there is simply no work for the union employees," says Schreier, the former union electrician.

Even if there is work in another jurisdiction, priority is given to the local union's members, a condition that independent contractors like T&C do not have to meet. IBEW's Hansen attacks the practice as the domestic equivalent of exporting jobs to low-paying Third World Countries.

Over and above the good pay and steady work T&C provides is the sense of personal growth and opportunity that employees feel, Sager says. Every effort is made to improve job performance and enhance individual skills. "Nobody is satisfied with just being a good electrician," he says. "We want them to have a sense of personal growth and career advancement."

A review committee consisting of line supervisors, project managers and administrative personnel assess the performance of hourly employees twice a year to determine raises and promotions.

"There are all kinds of opportunities for advancement," says Gary Lodholz, an electrician who has worked at T&C for 17 years. "And promotions are based on your own merit and performance. The people here seem very personable. You can go in and talk to anyone at the office at anytime."

But Hansen claims employees are bombarded with anti-union propaganda and intimidated with the threat of job loss. "We want T&C to be just as successful as it is," he smiles, "but with us."

Reviewing the history of the labor movement, Berry responds, unions were necessary to bring about management's recognition of human rights. "But in my opinion," he adds, "that need does not exist in this corporation. We spend a tremendous amount of time concentrating on communicating with our people, helping our people to do good work and grow in their potential, and I don't think we need a third party involved in that process."

(AV)
Bob Lowe is a reporter for the Appleton Post-Crescent. His last article, "Ports in Peril," appeared in the January issue of CRW.

DATE

POSITION
DESIRED

MI

FIRST

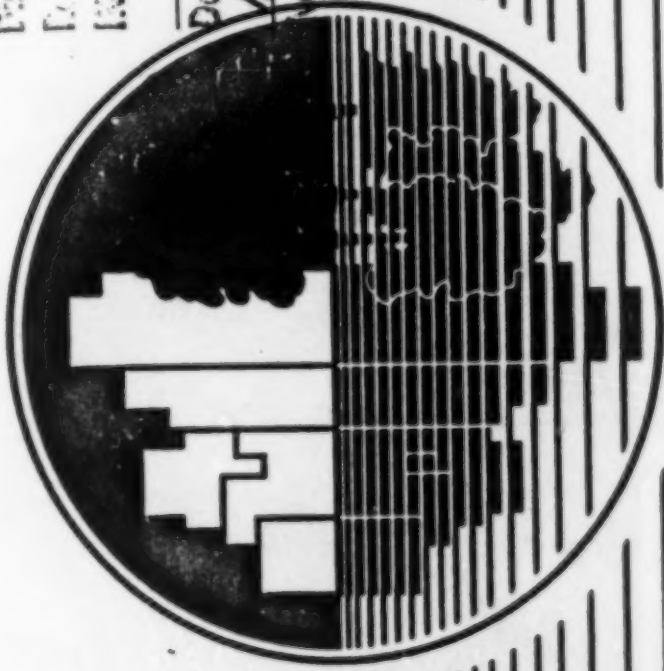
LAST

NAME

APPLICATION FOR EMPLOYMENT

268

Case No. 18-A-11035, 11044 CP#2 Official Exhibit No. CP#2
and 11080 (EC, Board, Party)
Discrimination: Identified ☒
Retained ☒
In Lieu of Retention: CP#
Town & Country
Date: 12/13/89 Witness: Murillo Reporter: Murillo
No. Pages: 10



TOWN & COUNTRY ELECTRIC, INC.

"AN EQUAL OPPORTUNITY EMPLOYER"

Charging Party Exh #2

THIS APPLICATION MUST BE FILLED OUT BY THE APPLICANT ONLY. PRINT NEATLY. ACCURATELY AND THOROUGHLY. ATTACH SUPPORTING DOCUMENTS IF NECESSARY. ALL INFORMATION WILL BE REGARDED AS CONFIDENTIAL. THIS APPLICATION WILL BE RETAINED IN AN ACTIVE FILE FOR A PERIOD OF SIX MONTHS. THEREAFTER, IF YOU STILL DESIRE EMPLOYMENT WITH TOWNS & COUNTRY ELECTRIC, INC. YOU MUST RE-APPLY.

EXCLUDE ANY REFERENCE WHICH MAY REVEAL OR TEND TO REVEAL YOUR RACE, COLOR, RELIGION, NATIONAL ORIGIN, CREED, AGE, OR MARITAL STATUS.

PERSONAL DATA

Name _____ Phone _____
Last First Middle Initial Soc. Sec. No. _____
How Long?
Address _____ No. Street City State Zip _____
How Long? Yrs. _____ Mos. _____
Former Address _____ No. Street City State Zip _____
How Long? Yrs. _____ Mos. _____
Own Home ☐ Rent ☐ Board ☐ Live with Parents ☐ Citizen of U.S.? Yes ☐ No ☐
No. of Dependent Children _____ Able to relocate Yes ☐ No ☐
Are you related to any employee of this company? Yes ☐ No ☐ Willing to travel Yes ☐ No ☐
Do you own a car Yes ☐ No ☐
Names of relatives in our employ _____
In case of emergency who should be notified? _____
Name _____ Phone Number _____
Address _____ City _____ State _____ Zip _____

EMPLOYMENT INTERESTS

Position desired _____ Date you _____ Salary or _____
Full time _____ Part-time _____ can start _____ Rate desired _____
Who referred _____ Have you ever _____
you to the company? _____ worked for us? _____ When? _____ Where? _____

Please attach copies of your high school, vocational, trade, or college transcripts.

EDUCATION [other than military]

Type of School	Name and Address of School	Dates		Did you Graduate?	Degree Granted	Major Subjects
		From	To			
High School						
College or University						
Graduate School						
Business School or Institute						
Other-Trade, Vocational, Correspondence etc.						

Scholastic honors, scholarships, assistantships, etc. _____
Met education expenses: Working _____ % GI Bill _____ % Parents _____ % Scholarships _____ % Other _____
Attending school now? _____ Where? _____

EMPLOYMENT HISTORY

270

Name and Address of Present Employer		Employed From	
Name of Your Supervisor	May We Contact Him/Her Yes <input type="checkbox"/> No <input type="checkbox"/>	To Your Last Wage Rate Hr. Wk.	
Describe Your Duties			
Explain Your Reason for Wanting to Leave			
Name and Address of Previous Employer		Employed From	
Name of Your Supervisor		To Your Last Wage Rate Hr. Wk.	
Describe Your Duties			
Explain Your Reason for Wanting to Leave			
Name and Address of Previous Employer		Employed From	
Name of Your Supervisor		To Your Last Wage Rate Hr. Wk.	
Describe Your Duties			
Explain Your Reason for Wanting to Leave			
Name and Address of Previous Employer		Employed From	
Name of Your Supervisor		To Your Last Wage Rate Hr. Wk.	
Describe Your Duties			
Explain Your Reason for Wanting to Leave			

U.S. MILITARY STATUS AND RECORD

Present Selective Service Classification (If 1-Y or 4-F Please Indicate Reason)				Are you a veteran of the Vietnam Era (8-5-64 through 5-7-75) <input type="checkbox"/> Yes <input type="checkbox"/> No	
Branch of Service	Active Duty Dates		Rank Held		Type of Duty
	From Mo./Yr.	To Mo./Yr.	Entry	Release	
					Awards - Medals - Citations
Do you have Reserve or Guard obligations?	How Long?		Type of Discharge or Separation		
Service School Attended	Was Separation due to a disability or aggravated in line of duty?				

MEDICAL HISTORY

Do you have any physical defects or illness?

☐ Yes ☐ No If yes, explain _____

Are you presently under a doctor's care?

☐ Yes ☐ No If yes, explain _____

Have you consulted a physician in the past three years?

☐ Yes ☐ No If yes, explain _____

Have you ever made claim for or received any disability benefits or pension?

☐ Yes ☐ No If yes, explain _____

Have you ever received workman's compensation for an injury or disease?

☐ Yes ☐ No If yes, explain _____

Have you ever had an industrial injury or disease?

☐ Yes ☐ No If yes, explain _____

How many work days have you missed in the last year due to illness? _____ How many days due to personal reasons? _____

Any personal history of: (If answer is yes, please explain).

Arthritis	<input type="checkbox"/> Yes <input type="checkbox"/> No	Epilepsy	<input type="checkbox"/> Yes <input type="checkbox"/> No	Osteomyelitis	<input type="checkbox"/> Yes <input type="checkbox"/> No
Asthma	<input type="checkbox"/> <input type="checkbox"/>	Seizures	<input type="checkbox"/> <input type="checkbox"/>	Rheumatic Fever	<input type="checkbox"/> <input type="checkbox"/>
Back Injury	<input type="checkbox"/> <input type="checkbox"/>	Heart Allment	<input type="checkbox"/> <input type="checkbox"/>	Rheumatism	<input type="checkbox"/> <input type="checkbox"/>
Brain Disease	<input type="checkbox"/> <input type="checkbox"/>	Hernia	<input type="checkbox"/> <input type="checkbox"/>	Surgical Operations	<input type="checkbox"/> <input type="checkbox"/>
Cancer	<input type="checkbox"/> <input type="checkbox"/>	High Blood Pressure	<input type="checkbox"/> <input type="checkbox"/>	Tuberculosis	<input type="checkbox"/> <input type="checkbox"/>
Color Blindness	<input type="checkbox"/> <input type="checkbox"/>	Hospitalized Last 5 Years	<input type="checkbox"/> <input type="checkbox"/>	Ulcers	<input type="checkbox"/> <input type="checkbox"/>
Convulsions	<input type="checkbox"/> <input type="checkbox"/>	Injury	<input type="checkbox"/> <input type="checkbox"/>	Varicose Veins	<input type="checkbox"/> <input type="checkbox"/>
Dermatitis	<input type="checkbox"/> <input type="checkbox"/>	Defective Vision	<input type="checkbox"/> <input type="checkbox"/>	Loss of Limb	<input type="checkbox"/> <input type="checkbox"/>
Diabetes	<input type="checkbox"/> <input type="checkbox"/>	Nervous Disorders	<input type="checkbox"/> <input type="checkbox"/>	Other	<input type="checkbox"/> <input type="checkbox"/>

Explanation _____
Are you willing to submit a physical examination? _____

REFERENCES

Give below the names of two personal references. (These references should be businessmen, professional men, teachers, or close personal acquaintances, not former employers or relatives.) It is to the applicant's advantage to give personal references which are most accessible.

Name and Occupation	Yrs. Known	Business Address				Home Address			
		St. Address	City	State	Zip Code	St. Address	City	State	Zip Code

UNDERSTANDING/AUTHORIZATION

Read Carefully

The information contained in this application is correct and accurate to the best of my knowledge. I understand that employment is subject to: Verification of applicable lawful age and legal right to remain permanently in the United States and I will furnish and submit such lawful proof, documents and permits as may be necessary to verify the same.

I hereby agree to submit to medical examination and I authorize any physician who has ever examined or treated me to give Town & Country Electric, Inc. a complete record and report.

I authorize: (A) investigation of the information contained in this application, of other matters concerning my past employment or other activities, (B) The issuance of reports or other statements which may be furnished or obtained concerning the same. I hereby release from any and all liability and responsibility all persons, companies or corporations supplying such information and Town and Country Electric, Inc. in obtaining the same.

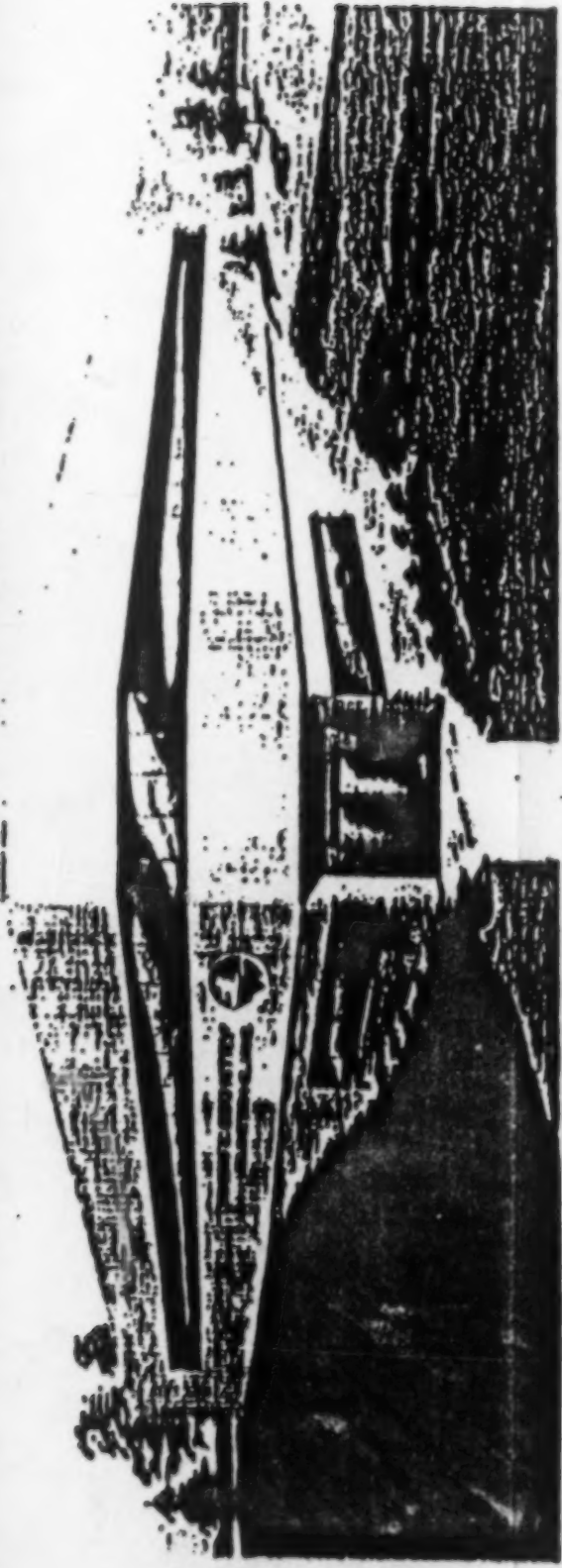
I agree to use such personal protective equipment and devices as may be required by the corporation and to comply with safety rules and requirements.

I understand that any misleading or incorrect statements may render this application void and in the event of my employment would be cause for immediate dismissal.

I understand that my possible employment is conditioned upon my being physically able to perform the job for which I am being considered and that this may be determined by a pre-employment physical examination.

I have carefully read the above and fully understand the same.

Signature: _____ Date: _____



TOWN & COUNTRY ELECTRIC, INC. was formed in October of 1972 by Roland G. Stephenson, the current president of the company. The Stephenson family has been involved in the electrical business for the past 93 years. John McCarter, Rollie Stephenson's great grandfather on his mother's side of the family, worked for the Edison Power Plant, the first hydro-electric plant, in 1896. Gordon Stephenson, Rollie's grandfather, graduated from Milwaukee School of Engineering in 1909. He taught at MSOE and worked at The Milwaukee Electrical Railway & Light Company, a power company in Milwaukee. Clyde Stephenson, Rollie's father, started his own electrical contracting company, Stephenson Electric Co., in 1952. Rollie learned the electrical trade by working with his father's company and in 1972 formed Town & Country Electric. The officers of Town & Country Electric have over 80 years of combined electrical contracting experience.

TOWN & COUNTRY ELECTRIC, INC. has grown substantially during its seventeen year history. Starting with three employees in 1972 doing about \$140,000 in sales, the company has grown to have in excess of 200 employees and \$12.9 million in sales in 1988. Town & Country serves the state of Wisconsin and its corporate office is located in Appleton. The corporation opened a Madison branch office in late 1985 and in 1987 opened branch offices in Milwaukee and Green Bay. Most recently the company opened a branch office in Stevens Point. The corporation has successfully completed projects in other states including North and South Dakota, Iowa, Minnesota, Illinois, Michigan and North Carolina.

TOWN & COUNTRY ELECTRIC, INC. has grown to be the largest merit shop electrical contractor in the state of Wisconsin. We work throughout the state of Wisconsin and the midwest on a variety of projects in the following areas:

Industrial:	Pulp and Paper Mills, Food and Dairy Plants, Foundries, and Bridges and Hydro Dams
Commercial:	Hotels, Office Buildings, Schools, and Hospitals and Health Care Facilities

TOWN & COUNTRY ELECTRIC, INC. would like to thank you, our customers, suppliers and friends, for allowing us to be part of your success. You have helped to make us what we are today -

One of Wisconsin's Leading Full Service Electrical Contractors

APPLETON, WISCONSIN

Appleton is located in east central Wisconsin, in the Fox River Valley area, 56 miles south of Green Bay. Appleton is the seat of Outagamie County. Nearby Lake Winnebago is noted for its fishing, duck hunting and water sports facilities.

Approx City Population 66,000
Approx NSA Population 317,000

Major products include paper products, plastics, knit ware, machinery, and printed goods. Nineteen paper mills are located along the Fox River as well as five insurance companies.

Employment by Industry

Construction	4.8
Finance, Insurance, Real Estate	6.8
Government	18.7
Light & Heavy Manufacturing	29.5
Retail & Wholesale Trade	26.2
Services	21.6
Transportation & Utilities	3.5
Traveling	3.6
Mining	.2

Major Employers

Kleberly Clark	Neenah Foundry Co
Neenah Corp	Presto Products
Miller Electric Mfg	AML
Appleton Papers Inc	Wisconsin Tissue Mills
Thiessy Pulp & Paper Co	Miltec Paper Co

Organized Labor Influence

Percentage Union Employees/All Employees 34.8 %

Colleges & Universities

Lawrence University	Enrollment 1200
U. W. Center - Fox Valley	1180
Fox Valley Technical Institute	47500
University of Wisconsin at Oshkosh	11300
Daily Newspapers	Circulation
The Post-Crescent	E - 55,000 S - 67,000

Television Stations

Call	Ch	Affiliation
WAT	2	CBS
WFRV	5	ABC
WLWK	11	NBC
WGAA	26	IND

Weather

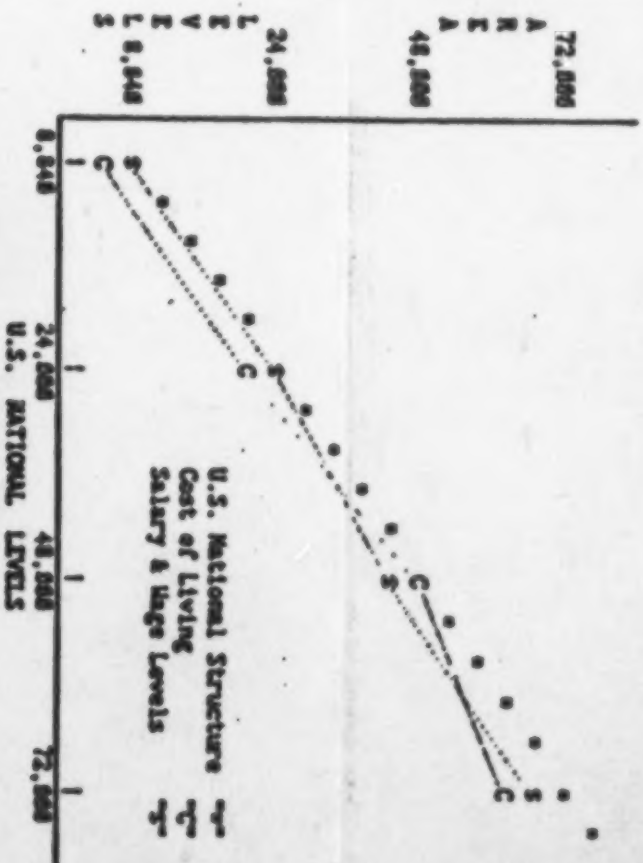
	Avg Temperature/Precipitation	
	Minimum	Maximum
January	7.	24.
February	11.	28.
March	22.	38.
April	35.	54.
May	46.	67.
June	56.	77.
July	61.	81.
August	68.	79.
September	51.	78.
October	41.	59.
November	28.	42.
December	15.	29.
Extremes & Totals	7.	81.
		36.6
		46.4

Area Crime Rate

Robberies	15.9/100000	Homicides	1.8/100000
Rapes	11.9/100000	Assaults	83.8/100000

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ETA Economic Research Institute

COMPARED TO THE U.S. NATIONAL AVERAGE



Recruiting/Entry Level Salaries

Unarmed Policeman	\$ 22278.	Computer Programmer	\$ 36656.
Correction Officer	\$ 18643.	Computer Operator	\$ 16912.
Investigator/Crime	\$ 27151.	Drafter	\$ 17499.
Librarian	\$ 21281.	Secretary	\$ 14595.
Teacher (Secondary)	\$ 21281.	Word Processor	\$ 14595.
Registered Nurse	\$ 21281.	Accounting Clerk	\$ 14595.

Housing Costs

Single 3 Bedroom, 2,000 sq ft Home	\$ 89432.
- estimated Mortgage Payment	\$ 786./month
- estimated Monthly Utilities	\$ 249./month
- estimated Annual Property Tax	\$ 2243.
Estimated Comparable Rental	\$ 732./month

Hospital & Health Care

Average Daily Semi-private Room Cost	\$ 281.
Average Total Hospital Cost Per Day	\$ 484.

Administrative Structures

	Cost of Living	Wage & Salary
Non Exempt	.936 x n + 132.	.925 x n + 525.
Exempt Non Bonus	.978 x n + 897.	.943 x n + 164.
Exempt Bonus	.835 x n + 6005.	1.089 x n + 3103.

Cost of Living Analyses v U.S. Average Level

	8,848	24,000	48,000	72,000
Housing/Rentals	76.5	76.5	76.5	76.5
Taxes S/C/T/R	122.5	111.5	128.5	187.5
Consumerables	99.5	99.5	99.5	99.5
Transportation	89.5	89.5	89.5	89.5
Services/Other	95.5	95.5	95.5	95.5
Total vs. U.S.	95.5	94.5	96.5	92.5

Estimated Workforce Demographics

Age 16-19	6.8 %	Age 20-44	64.3 %	Age 45 +	28.9 %
Caucasian	98.5 %	Black	.2 %	Hisp/oth	1.3 %
Male	49.7 %	Female	50.3 %		
Unemployment	4.2 %				

Recommended Secondary School/Districts

Neenah H.S.

Data Projected To: 9/15/89
Report Printed On: 9/15/89

TOWN & COUNTRY ELECTRIC, INC.

IN AN EFFORT TO MAINTAIN THE DRUG AND ALCOHOL FREE WORK ENVIRONMENT, ALL APPLICANTS FOR EMPLOYMENT WILL BE REQUIRED TO TAKE A DRUG SCREENING TEST AS PART OF THE PRE-EMPLOYMENT MEDICAL PROCESS.

Applicant's Signature

Date

EMPLOYMENT QUESTIONNAIRE

1. WHY SHOULD WE HIRE YOU AND WHY DO YOU FEEL YOU ARE QUALIFIED FOR THIS POSITION?
2. WHAT ARE YOUR SHORT AND LONG RANGE GOALS?
3. WHAT WERE SOME OF THE PROBLEMS YOU HAVE HAD ON YOUR PAST JOBS AND WHAT WERE THE SOLUTIONS?
4. WHAT RESPONSIBILITIES DO YOU MOST ENJOY? LEAST ENJOY?
5. WHAT DO YOU SEE AS YOUR GREATEST ACCOMPLISHMENT IN PAST JOBS?

6. WHAT IS YOUR GREATEST WEAKNESS? GREATEST STRENGTH?

7. HOW DO YOU DEFINE SUCCESS?

8. WOULD YOU RATHER DO A JOB, DESIGN IT, EVALUATE IT, OR
MANAGE OTHERS? WHY?

9. WHY DO YOU WANT TO WORK FOR OUR COMPANY? DO YOU KNOW
ANYTHING ABOUT US?

AN OPPORTUNITY WILL BE AVAILABLE TO DISCUSS YOUR ANSWERS TO
ALL OF THE ABOVE QUESTIONS AT A FUTURE INTERVIEW.

PLEASE RETURN THIS QUESTIONNAIRE IN THE ENVELOPE PROVIDED
WITHIN 5 DAYS.

THANK YOU.

NO EXPERIEN
SOME EXPER
VERY EXPER

HOW MUCH EXPERIENCE DO YOU HAVE WITH THE FOLLOWING:

RESIDENTIAL WIRING
COMMERCIAL WIRING
INDUSTRIAL WIRING
OTHER

RIGID & IMC CONDUIT BENDING, THREADING & INSTALLATION

1/2" THROUGH 1"
1 1/4" THROUGH 2"
2 1/2" THROUGH 4"
EXPLOSION PROOF WORK
PVC CONDUIT BENDING AND INSTALLATIONS

EET (ELECTRICAL METALLIC TUBING) BENDING AND INSTALLATION
1/2" THROUGH 1 1/4"
1 1/2" AND UP.

WIRE PULLING AND TERMINATING

#16 THROUGH #2
#1 THROUGH 500MCM
SPEAKER CABLE
TELEPHONE CABLE
COAX AND COMPUTER CABLE
FIBER OPTIC

HIGH & MEDIUM VOLTAGE WIRE PULLING & TERMINATING

5KV
15KV
35KV
OTHER

MOTOR AND MOTOR CONTROL WIRING

AC MOTOR WIRING
AC DRIVE WIRING
DC DRIVE WIRING
RELAY LOGIC
PROGRAMMABLE CONTROLLER HOOK-UP
PROGRAMMABLE CONTROLLER PROGRAMMING
OTHER

TRANSFORMER WIRING

CONTROL TRANSFORMERS
POWER TRANSFORMERS
OTHER

0 0 0
0 0 0
0 0 0

NATIONAL ELECTRICAL CODE EXPERIENCE
OTHER

1 0 0
1 0 0
1 0 0

PROJECT FOREMAN OR MANAGEMENT EXPERIENCE
INSTRUMENTATION EXPERIENCE

1 0 0
1 0 0
1 0 0

SYSTEMS EXPERIENCE

TV
FIRE ALARM
SECURITY
SPEAKER AND INTERCOM
OTHER

1 0 0
1 0 0
1 0 0
1 0 0
1 0 0

TROUBLE SHOOTING EXPERIENCE

1 0 0
1 0 0
1 0 0

ANY OTHER PERTINENT JOB EXPERIENCE THAT MAY BE USEFUL,
AS A CONSTRUCTION ELECTRICIAN

TO THE BEST OF MY KNOWLEDGE, ALL OF THE ABOVE IS TRUE
AND ACCURATE

SIGNATURE DATE

WE WOULD LIKE TO REQUEST YOUR INPUT ON THE ATTACHED "MINIMUM PRODUCTION STANDARDS" QUESTIONNAIRE. WE ASK THAT YOUR RESPONSES BE AS ACCURATE AND COMPLETE AS POSSIBLE IN ALL OF THE CATEGORIES. REMEMBER THAT EACH CATEGORY SHOULD BE EVALUATED ON THE BASIS OF THE MINIMUM AMOUNT OF WORK YOU COULD COMPLETE IN AN EIGHT HOUR DAY.

KEY

- * (1) LD = LOW DENSITY
OPEN AREAS, WAREHOUSING, EASY ACCESS, LESS THAN 30' HIGH
- * (2) MD = MEDIUM DENSITY
OFFICE AREAS, LIGHT INDUSTRIAL
- * (3) HD = HIGH DENSITY
HEAVY INDUSTRIAL, CROWDED CONDITIONS, OVER 35' HIGH

EXAMPLE:

INSTALLED QUANTITY PER DAY

RIGID & IMC CONDUIT			
30' 2 1/2" THROUGH 4"			
LOW DENSITY	* (1) LD	* (2) MD	* (3) HD
	700'	800'	900'

EMT BENDING			
60' 2" THROUGH 4"			
	200'	140'	900'

1. WIRE TERMINATING			
18' 3/4" THROUGH 250' HIGH (200 AMP) PANEL, DISCONNECT & BUSSES, WIRE TERMINATIONS			
	40'	60'	20'

1. WIRE PULLING			
18' 3/4" THROUGH 500' HIGH			
	400'	300'	180'

1. OUTLET INSTALLATIONS			
20' 3/4" THROUGH 500' HIGH			
	30'	30'	20'

PLEASE TURN TO NEXT PAGE AND COMPLETE QUESTIONNAIRE

INDIVIDUAL INSTALLATION STANDARDS QUESTIONNAIRE

KEY

- *(1) LD = LOW DENSITY
OPEN AREAS, WAREHOUSING, EASY ACCESS, LESS THAN 30' HIGH
- *(2) MD = MEDIUM DENSITY
OFFICE AREAS, LIGHT INDUSTRIAL
- *(3) HD = HIGH DENSITY
HEAVY INDUSTRIAL, CROWDED CONDITIONS, OVER 35' HIGH

INSTALLED QUANTITY PER DAY

RIGID & IMC CONDUIT BENDING, THREADING, ETC.

*(1) LD *(2) MD *(3) HD
LOW DENSITY MED. DENSITY HIGH DENSITY

1/2" THROUGH 1"			
1 1/4" THROUGH 2"			
2 1/2" THROUGH 4"			

EMT(ELECTRICAL METALLIC TUBING) BENDING/INSTALLATION

1/2" THROUGH 1"			
1 1/4" THROUGH 2"			
2" THROUGH 4"			

WIRE TERMINATING

71 812 AND SMALLER - CABLES WITH TERMINAL STRIPS			
81 812 THROUGH 810 - SWITCHES, RECEPTACLES, FIXTURES			
81 810 AND SMALLER - MOTOR TERMINATIONS			
101 810 THROUGH 1-0 1400 AMP - PANEL DISCONNECT & BUSS DUCT TERMINATIONS			
111 2/0 THROUGH 250 MCM 1200 AMP PANEL DISCONNECT & BUSS DUCT TERMINATIONS			
121 300 MCM 1400 AMP PANEL DISCONNECT & BUSS DUCT TERMINATIONS			
131 SPEAKER, TELEPHONE AND COMPUTER - SMALL CABLES			

WIRE PULLING WITH HELPER

141 816 THROUGH 810			
151 816 THROUGH 814			
161 816 THROUGH 811			
171 1/0 THROUGH 3/0			
181 4/0 THROUGH 500 MCM			
191 SPEAKER, TELEPHONE AND COMPUTER - SMALL CABLES			

OUTLET INSTALLATIONS (CONVENTIONAL WIRING)

201 SWITCHES, RECEPTACLES			
211 SPECIAL RECEPTACLES			
221 2 X 4 TRIGGER FIXTURES			
231 10-000 MD FIXTURES			
241 INDUSTRIAL FLUORESCENT FIXTURES - CHAIN HUNG (SINGLE)			
251 SURFACE MOUNT (SINGLE)			
261 FLUORESCENT STAMP FIXTURES CHAIN HUNG			
271 SURFACE MOUNT (SINGLE)			
281 CHAIN HUNG (ROUND)			
291 SURFACE MOUNT (ROUND)			
301 WALL PACKS & WALL MOUNT FIXTURES			
311 47 CORDLESS SURFACE MOUNT RECESSED FIXTURES			
321 RECESSED FIXTURES			

Jour Wireman NO. 160 Jk 11-72

CAT. NO. 1-0166

8-24-67	Egan-McKay Elec	never reported	2-20-85	Riser-RF 6-7-85
10-5-67	Industrial Elec	10-12-67 (40)	6-10-85	Claude Anderson-RF 6-14-85
8-14-72	Collins Elec	in Lincoln R 2-2-73	6-17-85	Sterling-RF 9-19-85
5-17-73	Batley Elec	10-13-73	9-29-86	Industrial UO 11-20-86
7-6-73	Commonwealth Elec	10-12-73	11-21-86	Sterling RF 2-13-87
12-15-73	City Traffic	R 1-4-74	3-16-87	Hunt RF 4-22-88
2-22-74	Water Dept	1-9 9-13-76	5-2-88	Egan-McKay RF 7-1-88
6-29-77	Mini Elect	Control R.F. 1-8-77	7-6-88	Green RF-8-26-88
7-14-77	Sterling Elec	R 2-7-20-77	8-30-88	American Eagle
7-21-77	Braun Elec			Xcelled case
8-8-77	Ryan Elec	-R.F. 8-12-77	8-31-88	Arcade RF 9-30-88
8-26-77	Langford Elec	RF 2-22-78	10-4-88	Gombred RF 10-10-88
11-9-78	Commonwealth	RF 12-28-81	10-12-88	Collins St Paul RF 5-11-89
12-29-81	12/29/81	H.R. Miller RF 2-12-82	6-13-89	Gopher RF 6-19-89
2-24-82	Huffman	VA 3-15-82	6-22-89	Sterling RF 8-21-89
9-13-82	Hoffman	RF 11-18-82	8-31-89	Parsons VA 10-1-89
2-21-83	Hunt	RF 3-4-83	10-16-89	Medina 10-20-89 RF
4-22-83	SAY	RF 2-8-83	10-24-89	Muska

Dep/

Hansen, Malcolm H.

4-4-39

C-3

Case No.

186A-11035 11044
and 11080

Official Exhibit No.

P#4
(Exhibit, Party)

Disposition:

Revised

IN THE MATTER OF:

Loan & Country

Date:

12/14/89

Witness:

Reporter:

Shival

No. Pages:

1

In the Supreme Court of the United States

No. 94-947

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

TOWN & COUNTRY ELECTRIC, INC., and
AMERISTAFF PERSONNEL CONTRACTORS, LTD.

ORDER ALLOWING CERTIORARI.

Filed January 23, 1995.

The petition herein for a writ of certiorari to the United
States Court of Appeals for the Eighth Circuit is granted.

January 23, 1995

(6)
No. 94-947

Supreme Court, U.S.
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MAR 16 1995

In the Supreme Court of the United States

OCTOBER TERM, 1994

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

TOWN & COUNTRY ELECTRIC, INC., AND
AMERISTAFF PERSONNEL CONTRACTORS, LTD.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

**BRIEF FOR THE
NATIONAL LABOR RELATIONS BOARD**

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QUESTION PRESENTED

Whether the National Labor Relations Board reasonably determined that a person applying for or holding a job with an employer that he intends to organize, and who will be compensated by a union for his organizational activity, is an "employee" within the meaning of Section 2(3) of the National Labor Relations Act (29 U.S.C. 152(3)) and therefore protected against discrimination on account of his union activity and affiliation.

II

PARTIES TO THE PROCEEDINGS

In addition to the parties listed in the caption, the following was a party to the proceedings in the court below: International Brotherhood of Electrical Workers, Local 292.

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In the Supreme Court of the United States

OCTOBER TERM, 1994

No. 94-947

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

TOWN & COUNTRY ELECTRIC, INC., AND
AMERISTAFF PERSONNEL CONTRACTORS, LTD.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF FOR THE
NATIONAL LABOR RELATIONS BOARD

OPINIONS BELOW

The opinion of the court of appeals, Pet. App. 1a-11a, is reported at 34 F.3d 625. The decision and order of the National Labor Relations Board, Pet. App. 12a-42a, and the decision and recommended order of the administrative law judge, Pet. App. 43a-135a, are reported at 309 N.L.R.B. 1250.

JURISDICTION

The judgment of the court of appeals was entered on August 31, 1994. The petition for a writ of certiorari was filed on November 23, 1994, and granted on January 23,

1995. J.A. 282. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISION INVOLVED

Section 2(3) of the National Labor Relations Act (Act), 29 U.S.C. 152(3), provides:

The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless this [Act] explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act [45 U.S.C. 151 et seq.], as amended from time to time, or by any other person who is not an employer as herein defined.

STATEMENT

1. Respondent Town & Country Electric, Inc., is a large nonunion electrical contractor based in Wisconsin. In early September 1989, Town & Country was awarded a contract to perform electrical renovation work at a paper mill in International Falls, Minnesota. Pet. App. 2a. After being awarded the contract, Town & Country learned that Minnesota requires an electrical contractor

to employ at least one electrician licensed by that State for every two unlicensed electricians working at a job site. At the time, none of Town & Country's electricians had a Minnesota license. *Ibid.*

To help it recruit Minnesota-licensed electricians, Town & Country retained respondent Ameristaff Personnel Contractors, Ltd., an employment agency. Pet. App. 2a. Town & Country instructed Ameristaff that applicants had to be able to work in a nonunion shop. *Id.* at 16a. On September 3, 1989, Ameristaff advertised for "licensed journeymen electricians" in a Minneapolis newspaper. Applicants responding to the advertisements were asked, *inter alia*, whether they preferred to work union or nonunion. *Ibid.* Ameristaff arranged for interviews with seven applicants to be held on September 7, 1989, at a Minneapolis hotel. *Id.* at 2a-3a, 16a.

Members of the International Brotherhood of Electrical Workers, Locals 292 and 343 (the Union), learned of the job. The Union encouraged its unemployed members to apply, with the understanding that those members, if hired, would attempt to organize the job site. The Union had established a fund to reimburse members for wage, travel, and health-benefit differentials incurred on nonunion jobs. Pet. App. 16a.

On September 7, 1989, officials of respondents appeared at the hotel to interview applicants. Only one of the seven applicants with a scheduled interview was present. Pet. App. 3a. Also present for interviews were approximately one dozen members of the Union, two of whom were full-time paid union officials, and the rest of whom were unemployed electricians. *Id.* at 3a, 17a. Respondents' officials expressed pleasure with the size of the turnout (*id.* at 65a), and gave the nonscheduled applicants application forms to complete. The completed applications of the union applicants showed that they were

licensed electricians who were both qualified and available for work. *Id.* at 53a-54a, 59a-60a. Respondents' officials interviewed the nonunion applicant and a union member who had no appointment but who stated that he had to leave soon to care for his children. Neither was hired. *Id.* at 3a, 17a.

Steven Buelow, Ameristaff's president, then advised the remaining applicants, all of whom were union members, that the job was nonunion. The union members stated that they were interested in any job available. Pet. App. 18a. Buelow then advised Ron Sager, Town & Country's manager of human resources, that he had concluded that the remaining applicants were all "union." *Id.* at 3a, 18a; J.A. 103. Sager thereupon cancelled further interviews. Pet App. 3a, 18a.

One of the unemployed union members, Malcolm Hansen, protested that he had called Ameristaff that morning and had been told to report for an interview at the hotel, and that he would refuse to leave until interviewed. Pet. App. 3a, 18a-19a. Sager at first threatened to have the union members forcibly removed. *Id.* at 19a. Sager then stated that he would check on Hansen's situation and honor the commitment to Hansen if Hansen's account was verified. *Ibid.* Upon obtaining verification of that account, Sager interviewed Hansen, and hired him. *Id.* at 3a-4a, 19a. Sager advised the remaining union members that he would not interview them, despite Town & Country's stated need for more than one licensed electrician, and despite the fact that only five days remained before work on the project was to commence. *Id.* at 19a, 56a.

Hansen's job began on September 12, 1989. The following day, during a recess, Hansen announced that he was seeking to organize employees for the Union. Pet. App. 4a, 91a. Town & Country's project super-

intendent, who was present, immediately telephoned his superiors. When he returned from the call, he told Hansen that Hansen would be fired if he continued to talk about the Union. *Id.* at 91a-92a, 109a n.73, 121a, 128a (¶ 6). The following day, at the noon recess, Hansen sought to convince the work crew of the merits of union organization. *Id.* at 102a. Later that day, Hansen was discharged. *Id.* at 4a, 100a, 106a-107a.¹ After the discharge, the Union reimbursed Hansen for wage, benefit and travel differentials, and materials. *Id.* at 9a & n.2.

2. The General Counsel of the National Labor Relations Board (Board) issued a complaint alleging, *inter alia*, that respondents violated Section 8(a)(1) and (3) of the Act, 29 U.S.C. 158(a)(1) and (3), by refusing to consider the union members for employment because of their union affiliation, and by terminating Hansen because of his union activities.² Respondents contended

¹ The company's stated reason for the discharge was that it had terminated its contract with Ameristaff, having learned that, under Minnesota law, an electrical contractor could not use temporary employees such as Hansen from an employment agency; rather, all employees had to be directly employed by the contractor. Town & Country, however, rejected Hansen's request that the company hire him directly. Pet. App. 4a, 107a.

² Section 8(a)(1) of the Act makes it an unfair labor practice "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in [Section 7]." 29 U.S.C. 158(a)(1). Section 7 of the Act grants employees the right, *inter alia*, "to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining." 29 U.S.C. 157. Section 8(a)(3) of the Act makes it an unfair labor practice to discriminate "in regard to hire or tenure of

that they had acted for nondiscriminatory reasons, and that, in any event, neither the applicants nor Hansen were bona fide "employees" within the meaning of Section 2(3) of the Act, 29 U.S.C. 152(3). Pet. App. 20a-21a.

a. The administrative law judge (ALJ) found that respondents had violated Section 8(a)(1) and (3) of the Act. He found that respondents had refused to consider the job applicants for employment because of their presumed union affiliation. Pet. App. 56a-69a. He further found that Town & Country had terminated Hansen's employment because of his attempts to unionize the other electricians. *Id.* at 109a-110a. The ALJ rejected Town & Country's claim that Hansen had been fired for poor performance, deeming that claim a "thinly veiled attempt to mislead as to the true reasons" for the discharge, and finding the claim to be "lacking in credible support." *Id.* at 121a.

The ALJ also rejected respondents' claim that the union members, by virtue of the fact that they stood to be compensated by the Union for organizing respondent Town & Country's work force, were not "employees" under the Act. In *H.B. Zachry Co.*, 289 N.L.R.B. 838 (1988), enforcement denied, 886 F.2d 70 (4th Cir. 1989), the ALJ noted, the Board had held that paid union organizers who apply for or in fact work for hire for an employer are "employees" within the meaning of Section 2(3) of the Act. Accordingly, the ALJ found that the two union officials and the other union members who had applied for employment were protected by the Act against discrimination based on their union activity or affiliation. Pet. App. 53a n.13. Hansen's goal of organ-

employment * * * to encourage or discourage membership in any labor organization." 29 U.S.C. 158(a)(3).

izing the other electricians did not deprive him of the Act's protection, the ALJ held. Rather, Hansen was "a rank-and-file union member," and "was dependent financially on employment as a journeyman electrician in the construction industry." *Id.* at 107a n.69. Thus, "Hansen's intention to organize was not incompatible with his basic employment needs and objectives and did not debar him from statutory protection." *Ibid.*

b. The Board adopted the ALJ's findings of fact. Pet. App. 13a & n.3. In agreement with the ALJ, the Board concluded that respondents, by refusing to interview the union members and by discharging Hansen on account of their union affiliation, had violated Section 8(a)(1) and (3) of the Act. *Id.* at 12a-42a.

The Board also reconsidered and reaffirmed its position in *Zachry* that paid union organizers are "employees" within the meaning of Section 2(3) of the Act and are therefore protected against discriminatory refusals to hire and discriminatory termination. Pet. App. 32a-33a.³ The Board noted that applicants for employment have been held to be "employees" within the meaning of Section 2(3) ever since *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177 (1941). Pet. App. 22a. The fact that an applicant is a paid union organizer seeking to unionize an employer's work force does not change that result, the Board reasoned. Section 2(3) defines "employee" as "any employee," and paid union organizers do not fall within any of the Act's specific exclusions. *Id.* at 23a-24a. Moreover, both the legislative history and this Court's interpretations of the Act support a broad definition of the statutory term "employee." *Id.* at 24a-29a. For a paid union organizer simultaneously to be an

³ The Board reached the same result in a companion case. See *Sunland Construction Co.*, 309 N.L.R.B. 1224 (1992).

"employee" of another entity also comports with the common-law principles of agency to which this Court has looked to define the term "employee" in cases in which it was left undefined by statute, the Board concluded. Under the common law, "[a] person may be the servant of two masters, not joint employers, at one time as to one act, if the service to one does not involve abandonment of the service to the other." *Id.* at 28a (quoting 1 Restatement (Second) of Agency § 226, at 498 (1958)). Finally, protecting paid union organizers as "employees" furthers the Act's goal of promoting the right to organize, while leaving intact management's legitimate rights to direct and control employees under its supervision and to limit union solicitation to nonwork time. Pet. App. 33a-39a.

As a remedy, the Board adopted the ALJ's recommended order that Town & Country, *inter alia*, offer employment to Hansen and the union members who had been denied interviews, and make the union members whole for any losses suffered as a result of Town & Country's discrimination. Pet. App. 40a, 131a-133a.⁴

3. The court of appeals reversed. Pet. App. 1a-11a. It accepted respondents' contention that a paid union organizer is not an "employee" within the meaning of Section 2(3) of the Act, and therefore denied enforcement of the Board's order. *Id.* at 7a-9a.⁵ The court noted that

⁴ The Board left to compliance proceedings the determination of how many electricians Town & Country would have hired absent its antiunion discrimination, and thus how many of the ten applicants are actually entitled to a remedy. Pet. App. 130a.

⁵ The court of appeals found it unnecessary to consider respondents' remaining contentions that the Board "improperly approved the ALJ's use of an irrebuttable presumption that all nonunion employers are unlawfully motivated to discriminate against individuals who are affiliated with a union," and that it

the circuits are split on whether paid union organizers are employees under the Act, with the District of Columbia, Second, and Third Circuits holding that they are, and the Fourth and Sixth Circuits holding that they are not. *Id.* at 5a-7a; see *Willmar Electric Service, Inc. v. NLRB*, 968 F.2d 1327, 1329-1331 (D.C. Cir. 1992), cert. denied, 113 S. Ct. 1252 (1993); *NLRB v. Henlopen Manufacturing Co.*, 599 F.2d 26, 30 (2d Cir. 1979); *H.B. Zachry Co. v. NLRB*, 886 F.2d 70, 72 (4th Cir. 1989); *NLRB v. Elias Brothers Big Boy, Inc.*, 327 F.2d 421, 427 (6th Cir. 1964); see also *Escada (USA) Inc. v. NLRB*, 970 F.2d 898 (3d Cir. 1992) (Table).

The court of appeals found the Fourth Circuit's reasoning in *Zachry* to be persuasive. Pet. App. 7a. The court stated that it found the definition of "employee" in the Act to be of "little help." *Ibid.* Instead, the court looked to the common law for guidance. It noted that an individual may be "the servant of two masters at one time only if service to one does not involve abandonment of or conflict with service to the other." *Id.* at 8a (citing 1 Restatement, *supra*, § 226, at 498). Ordinarily, a job applicant may be simultaneously loyal to his union and to his nonunion employer, the court stated. Pet. App. 8a. But the Union's two full-time organizers "were not typical applicants," the court stated, because they already had a job and "wanted to enter Town & Country's work force not for financial gain, but to organize its workers." *Ibid.* And "[w]hen a union official applies for a position only to further the union's interests, * * * an inherent conflict of interest exists," the court reasoned, for "the union official will follow the mandates of the union, not his new employer." *Id.* at 8a-9a. For example,

"failed to follow precedent that permits employers to prohibit solicitation during work time." Pet. App. 11a.

"[i]f the union asks him to quit working for his second employer, he will do so." *Id.* at 9a. Further, the court stated, a full-time union official "has a reduced incentive to be a good employee for his second employer," because, if terminated, "he simply returns to his full-time union job." *Ibid.*

The court of appeals further held that the unemployed electricians who belonged to the Union (including Hansen) were also not "employees" within the meaning of Section 2(3) of the Act, because they "were also under [the Union's] control." Pet. App. 9a. The court based this conclusion on three factors. First, the unemployed union members had been encouraged by the Union to apply. *Ibid.* Second, the Union had committed to paying the difference between their salaries and union-scale wages. *Ibid.* Third, the union members were subject to the Union's "job salting organizing resolution," which provided that members could work for nonunion employers "only if they work for organizational purposes," and that union members were to leave the nonunion job upon notification by the Union. *Id.* at 9a-10a. That last provision, the court stated, was "controlling," for a union's "control over a putative employee's job tenure * * * is inimical to, and inconsistent with, the employer-employee relationship." *Id.* at 10a.

SUMMARY OF ARGUMENT

The Board has long held that a worker who is a paid union organizer is an "employee" within the meaning of Section 2(3) of the National Labor Relations Act (Act), 29 U.S.C. 152(3). In light of the Board's role as the agency primarily responsible for developing and applying national labor policy, that interpretation warrants deference and should be upheld if it is "rational and consistent with the Act." *NLRB v. Curtin Matheson*

Scientific, Inc., 494 U.S. 775, 786-787 (1990). The Board's interpretation in this case is not only consistent with, but is strongly supported by, the text of the Act.

As this Court has recognized, the breadth of Section 2(3)'s definition is "striking." *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 891 (1984). Section 2(3) provides that "[t]he term 'employee' shall include *any* employee," subject only to a list of specific exclusions for categories of workers. 29 U.S.C. 152(3) (emphasis added). Paid union organizers do not fit within any of those excluded groups, and Section 7 of the Act, 29 U.S.C. 157, refutes any claim that an otherwise-covered worker forfeits his status as an "employee" by engaging in organizing activities: it provides, *inter alia*, that "[e]mployees shall have the right to self-organization" (emphasis added). Under the principle of *expressio unius est exclusio alterius*, the absence in Section 2(3) of any exclusion for employees who are paid by a union for such organizing establishes that paid union organizers are "employees." The legislative history of the Act supports that interpretation, as does a provision of the closely related Labor Management Relations Act of 1947, which recognizes that a worker can simultaneously be an employee of both a union and an employer.

The court of appeals therefore erred in disregarding the text of the Act as providing "little help," and in defining "employee" instead solely by reference to common-law principles of agency. In any event, those principles are not offended by treating a paid union organizer as an employee. The court of appeals gave three reasons for holding that a worker's role as a paid union organizer inherently conflicts with his duties to his employer. The court of appeals feared, first, that such a worker might engage in "organizational activities at [the employer's] expense." Pet. App. 9a. However,

such activities are protected under the Act, subject to the employer's right reasonably to restrict organizing where it would impede workplace discipline or productivity. Second, the court feared that a union might direct a paid union organizer to resign abruptly. However, an employer may guard against such transience by refusing, on a union-neutral basis, to hire employees who may be unable to serve for a given duration, and by otherwise structuring terms of employment. Third, the court feared that paid union organizers will be "disloyal." But there is no basis for inferring that a paid union organizer will commit acts of disloyalty against an employer, as opposed simply to exercising his protected right to organize.

Finally, the court of appeals' interpretation of the term "employee" would produce anomalous results and defeat important policies of the Act. It would leave workers unprotected against blatant acts of antiunion discrimination. And, because many other federal statutes (such as those prohibiting discrimination on the basis of race, gender, and age) use the term "employee" with no greater guidance than that provided by the Act, the court of appeals' interpretation would threaten to deprive workers for hire who are paid union organizers of many important legal rights.

ARGUMENT

THE BOARD REASONABLY DETERMINED THAT A PAID UNION ORGANIZER APPLYING FOR OR HOLDING A JOB WITH AN EMPLOYER WHOM HE INTENDS TO ORGANIZE IS AN "EMPLOYEE" UNDER SECTION 2(3) OF THE NATIONAL LABOR RELATIONS ACT

A. The Text And History Of The Act Support The Board's Longstanding Determination That A Paid Union Organizer Who Applies For Work For Hire Or Holds Such A Job Is An "Employee" Protected Against Antiunion Discrimination, And That Determination Is Entitled To Deference

1. As this Court has often explained, Congress gave the National Labor Relations Board (Board) the "primary responsibility for developing and applying national labor policy." *NLRB v. Curtin Matheson Scientific, Inc.*, 494 U.S. 775, 786 (1990); see also *Beth Israel Hosp. v. NLRB*, 437 U.S. 483, 500-501 (1978); *NLRB v. Erie Resistor Corp.*, 373 U.S. 221, 236 (1963). Accordingly, where the Act does not speak directly to an issue, the Court gives "considerable deference" to the Board's interpretation, and will uphold that interpretation if it is "rational and consistent with the Act," even if the Members of this Court "would have formulated a different rule had [they] sat on the Board." *Curtin Matheson*, 494 U.S. at 786-787; *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27, 42 (1987); *NLRB v. Local Union No. 103, Int'l Ass'n of Bridge Workers*, 434 U.S. 335, 350 (1978); see *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-843 (1984). Deference is particularly appropriate where the interpretation in question is a "consistent,

longstanding interpretation of the NLRA by the Board.” *NLRB v. Hendricks County Rural Electric Membership Corp.*, 454 U.S. 170, 189-190 (1981); see also *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 401-402 (1983); *Bayside Enterprises, Inc. v. NLRB*, 429 U.S. 298, 303 (1977).

In this case, the Board has held that a “paid union organizer”—a person who applies for or holds a job with an employer that he intends to organize and who will be compensated by a union for his organizational activity—is an “employee” within the meaning of Section 2(3) of the National Labor Relations Act (Act), 29 U.S.C. 152(3). A statutory “employee” is, under Section 8(a) of the Act, 29 U.S.C. 158(a), protected against various forms of antiunion discrimination by an employer. The Board’s interpretation is a longstanding and consistent one. See *Holbrook Knitwear, Inc.*, 169 N.L.R.B. 768, 771 (1967); *Sears, Roebuck & Co.*, 170 N.L.R.B. 533, 535 n.1 (1968); *Dee Knitting Mills, Inc.*, 214 N.L.R.B. 1041, 1041 (1974), enforced mem., 538 F.2d 312 (2d Cir. 1975) (Table); *Oak Apparel, Inc.*, 218 N.L.R.B. 701, 701 (1975); *Anthony Forest Products Co.*, 231 N.L.R.B. 976, 977-978 (1977); *Henlopen Manufacturing Co.*, 235 N.L.R.B. 183, 184 (1978), enforcement denied on other grounds, 599 F.2d 26 (2d Cir. 1979); *Lyndale Manufacturing Corp., Inc.*, 238 N.L.R.B. 1281, 1283 n.3 (1978); *Margaret Anzalone, Inc.*, 242 N.L.R.B. 879, 888 (1979); *Columbia Engineers Int’l*, 249 N.L.R.B. 1023, 1028 n.8 (1980); *Palby Lingerie, Inc.*, 252 N.L.R.B. 176, 182 (1980); *Pilliod of Mississippi, Inc.*, 275 N.L.R.B. 799, 811 (1985); *Multimatic Products, Inc.*, 288 N.L.R.B. 1279, 1313 n.226, 1316 (1988); *H.B. Zachry Co.*, 289 N.L.R.B. 838, 839-841 (1988), enforcement denied, 886 F.2d 70 (4th Cir. 1989); *Willmar Electric Service, Inc.*, 303 N.L.R.B. 245, 252 & n.24, 253 & n.37 (1991), enforced, 968 F.2d 1327 (D.C. Cir. 1992), cert. denied, 113

S. Ct. 1252 (1993); *Escada (USA) Inc.*, 304 N.L.R.B. 845, 848 (1991), enforced mem., 970 F.2d 898 (3d Cir. 1992). The Board reexamined and reaffirmed that interpretation in this case (Pet. App. 22a-40a) and a companion case, *Sunland Construction Co.*, 309 N.L.R.B. 1224 (1992). The Board’s interpretation is not only reasonable—in light of the text, structure, and history of the Act, it is clearly correct.

2. Section 2(3) of the Act provides that “[t]he term ‘employee’ shall include *any* employee,” subject only to specific exclusions for agricultural laborers, domestic workers, supervisors, individuals employed by their spouses or parents or as independent contractors, and individuals employed by a person who is not an employer under the Act. 29 U.S.C. 152(3) (emphasis added). As this Court has observed, “[t]he breadth of § 2(3)’s definition is striking: The Act squarely applies to ‘any employee[]’ [and] [t]he only limitations are specific exemptions” in the statute. *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 891 (1984).

In *Sure-Tan*, this Court held that undocumented aliens “plainly come within the broad statutory definition of ‘employee’” because they “are not among the few groups of workers expressly exempted by Congress.” 467 U.S. at 892. The Court emphasized that, “[s]ince the task of defining the term ‘employee’ is one that ‘has been assigned primarily to the agency created by Congress to administer the Act,’ the Board’s construction of that term is entitled to considerable deference, and we will uphold any interpretation that is reasonably defensible.” *Id.* at 891 (quoting *NLRB v. Hearst Publications, Inc.*, 322 U.S. 111, 130 (1944)). On many other occasions, this Court has recognized that, in light of the breadth of Section 2(3), deference is due to reasonable Board determinations that particular workers are

"employees." See, e.g., *Allied Chemical & Alkali Workers v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 166 (1971) ("plain meaning" of term "employee" extends to class of individuals "who work for another for hire," and the task of determining "the contours of the term 'employee'" properly belongs to the Board, except where that determination is unreasonable); *NLRB v. E.C. Atkins & Co.*, 331 U.S. 398 (1947) (sustaining Board holding that war-production employer's security personnel, who were required by the government to be hired as "civilian auxiliaries to the military police," were "employees"); *Packard Motor Car Co. v. NLRB*, 330 U.S. 485 (1947) (sustaining Board holding, before addition to Section 2(3) of language excluding "any individual employed as a supervisor," that supervisors and foremen were "employees"); *NLRB v. Hearst Publications, Inc.*, *supra* (sustaining Board holding, before addition to Section 2(3) of language excluding "any individual having the status of an independent contractor," that newsboys who might be considered independent contractors were "employees").

Notwithstanding those admonitions, the court of appeals ruled that the text of the Act (and hence the Board's interpretation of that text) "provides little help" on the issue of whether a paid union organizer is an "employee." Pet. App. 7a. Instead, the court of appeals relied solely on its own application of common-law principles of agency to a paid union organizer. *Id.* at 7a-10a. The court of appeals' basis for taking that approach was the canon that, where a statute provides no guidance as to the meaning of the term "employee," courts are to presume that "Congress intended to describe the conventional master-servant relationship as understood by common-law agency doctrine." Pet. App. 7a-8a (quoting *Nationwide Mutual Ins. Co. v. Darden*, 112 S. Ct. 1344,

1348 (1992)). Based on that interpretive canon, common-law principles of agency are used, for example, to determine under the Act whether particular workers are protected "employees" or excluded "independent contractors," because the Act provides no guidance on how to distinguish between those categories. See *NLRB v. United Ins. Co. of America*, 390 U.S. 254, 256-260 (1968) (upholding Board's determination that the "debit agents" of an insurance company were "employees," not independent contractors).

The court of appeals fundamentally erred in disregarding the text of the Act—and the Board's interpretation of that text—on the issue of whether a paid union organizer is an "employee." There is no suggestion that the organizers in this case, or that paid organizers in general, fit within any of the statutory exclusions: As between the categories of "employee" and "independent contractor," for example, paid organizers who are workers for hire are clearly "employees." See *Pittsburgh Plate Glass*, 404 U.S. at 166. And the Act itself squarely answers the question whether the fact that an otherwise-protected worker plans to engage in union organizing renders him a non-"employee." Section 7 provides that a statutory "employee" is entitled to take such action: "*Employees* shall have the right to self-organization, to form, join, or assist labor organizations." 29 U.S.C. 157 (emphasis added). See *American Hosp. Ass'n v. NLRB*, 499 U.S. 606, 609 (1991) ("The central purpose of the Act was to protect and facilitate employees' opportunity to organize unions to represent them."). The statutory text thus makes clear that a worker for hire does not surrender his status as an "employee" by engaging in union organizing—or, in

other words, that a worker for hire who is a union organizer is an "employee."⁶

It has likewise been established since *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177 (1941), that an applicant for work for hire is also an "employee," and that an employer may not refuse to hire such an applicant because the applicant intends, if hired, to engage in protected organizing activity. In *Phelps Dodge*, the Court recognized that classifying applicants as non-"employees" would effectively nullify Section 8(3) of the Act (now Section 8(a)(3)), which makes it an unfair labor practice for an employer to discriminate "in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization." 29 U.S.C. 158(a)(3). As Justice Frankfurter, writing for the Court, put the point,

[w]e are asked to read "hire" as meaning the wages paid to an employee so as to make the statute merely forbid discrimination in one of the terms of men who have secured employment. So to read the statute would do violence to a spontaneous textual reading of § 8(3) in that "hire" would serve no function because, in the sense which is urged upon us, it is included in the [§ 8(3)] prohibition against "discrimination in regard to * * * any term or condition of employment." Contemporaneous legislative history,

⁶ As we discuss at pages 25-27, *infra*, an employer may limit organizing activities to nonworking hours and may adopt reasonable rules to ensure that such activities do not interfere with discipline and production. But it is otherwise an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of" the Section 7 right to organize. 29 U.S.C. 158(a)(1). See *Lechmere, Inc. v. NLRB*, 502 U.S. 527, 533 (1992).

and, above all, the background of industrial experience, forbid such textual mutilation.

313 U.S. at 186 (footnote omitted).

Thus, the Court held, a job applicant falls within the "broad definition of 'employee' with which § 2(3) begins," and is eligible for the remedies accorded to "employees" discriminated against because of their union affiliation or activities. 313 U.S. at 192. Since *Phelps Dodge*, Congress has not amended Section 2(3) to restrict the Act's coverage of job applicants, even though it has added exclusions to that provision in response to other rulings of this Court. See *United Ins.*, 390 U.S. at 256 (noting that Congress added the exclusion for independent contractors to Section 2(3) in response to the decision in *Hearst, supra*, that newsboys who could be considered independent contractors were statutory "employees"); *Nationwide Mutual Ins.*, 112 S. Ct. at 1349 (same); *Florida Power & Light Co. v. International Bhd. of Electrical Workers, Local 641*, 417 U.S. 790, 807-811 (1974) (noting that Congress added the exclusion for supervisors to Section 2(3) in response to the decision in *Packard Motor Car Co. v. NLRB, supra*, that foremen were statutory "employees").

3. The decisive issue in this case is therefore simply whether the fact that a worker for hire or a job applicant who intends to exercise the right to organize loses his status as a protected "employee" solely because a union will pay him for his organizing. Neither the text of Section 2(3) nor the history of the Act supports—indeed, they belie—such an interpretation. The Board's interpretation that a paid union organizer is an "employee" therefore should be upheld as "rational and consistent with the Act." *Curtin-Matheson*, 494 U.S. at 786-787.

Denying "employee" status to a worker solely because he receives pay for organizing a work force cannot be squared with the Act's broad definition of "employee," as the Board has recognized. Pet. App. 22a-24a. Section 2(3) covers "any employee" except those specifically excluded, and no exclusion exists for workers based on the relationship they have with a union or the monetary compensation they expect to receive from a union. 29 U.S.C. 152(3) (emphasis added). Moreover, one of the statutory exclusions, for supervisors, was added to address the same broad policy concerns cited by the court of appeals: that employers should not have to tolerate workers who might have divided loyalties. See *Florida Power & Light*, 417 U.S. at 810 (exclusion for supervisors was added to ensure that the employer had the loyalty of foremen in dealing with the rank and file, rather than having "the rank and file boss[] them") (quoting H.R. Rep. No. 245, 80th Cong., 1st Sess. 14 (1947)). Yet no similar exclusion was added for other workers with potentially divided loyalties, such as a worker who simultaneously receives pay from an employer and a union.

In light of Section 2(3)'s sweeping command that *any* employee not specifically excluded is a statutory "employee," the canon *expressio unius est exclusio alterius* (the inclusion of one thing negatively implies the exclusion of others) applies in this case with particular force. Cf. *United States v. Rosenwasser*, 323 U.S. 360, 362-363 (1945). Workers for hire and job applicants who will be paid for union organizing, like undocumented aliens, are simply not "among the few groups of workers expressly exempted by Congress." *Sure-Tan*, 467 U.S. at 892.

As the Board has noted (Pet. App. 24a-26a), the legislative history of Section 2(3), although containing

no detailed analysis of its scope, also supplies no support for excluding from the Act's coverage an otherwise-covered worker who is a paid union organizer. As Section 2(3) was enacted in 1935, it was identical in its structure and wording to the present provision, although it contained fewer exemptions than it does today. See National Labor Relations Act, ch. 372, § 2(3), 49 Stat. 450.⁷ The history of that provision indicates that Congress used the term "employee" to embrace without exception the class of "workers," "wage earners" and "workmen" who comprise the work forces of "employers." See Pet. App. 25a; see also 79 Cong. Rec. 9686 (1935) (Rep. Connery, bill's floor manager, states that Act protects "every man on a pay roll"), reprinted in II Legislative History of the National Labor Relations Act of 1935, at 3119 (1949) [hereinafter *NLRA Leg. Hist.*]; *National Labor Relations Board: Hearings on S. 1958 Before the Senate Comm. on Education and Labor*, 74th Cong., 1st Sess. 42 (1935) (Sen. Wagner, bill's sponsor, states that Act generally protects "the workers"), reprinted in I *NLRA Leg. Hist.* 1418.⁸

⁷ As enacted in 1935, Section 2(3) provided:

The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse.

⁸ Based on its broad language and its legislative history, the Board has interpreted Section 2(3) as using the term "employee" in its "broad generic sense," and has concluded in numerous

In 1947, Congress passed the Labor Management Relations Act, 1947, ch. 120, 61 Stat. 136 (LMRA). Title I of the LMRA amended Section 2(3) of the Act to add exclusions for independent contractors, supervisors, and employees of an employer who is "not an employer" under the Act, see LMRA § 101, 61 Stat. 137-138; *Florida Power & Light*, 417 U.S. at 807-811, but it did not otherwise limit the broad scope of that provision. Instead, the history of the LMRA indicates, Congress continued to use the term "employee" to refer broadly to the class of people who "work[] for another for hire," or who "work for wages or salaries under direct supervision." H.R. Rep. No. 245, *supra*, at 18, reprinted in I Legislative History of the Labor Management Relations Act, 1947, at 309 (1974).

Indeed, in contemporaneously enacting Title III of the LMRA, 29 U.S.C. 185-187, Congress manifested an assumption that an "employee" may be not only paid but employed simultaneously by a union and an employer. Although Section 302(a) of the LMRA, 29 U.S.C. 186(a), generally prohibits payments by an employer to an

contexts apart from that of the paid union organizer that "the term must be interpreted to include members of the working class generally." *Briggs Manufacturing Co.*, 75 N.L.R.B. 569, 570-571 (1947); see also *Giant Food Markets, Inc.*, 241 N.L.R.B. 727, 728 & n.5 (1979). Thus, the Board has accorded "employee" status not only to employees of a particular employer, but also to employees of another employer, former employees of a particular employer, temporary and part-time employees, individuals attending school or working a second job, individuals with announced intentions to quit in the near future, and individuals secretly seeking work with a competitor. See cases cited at Pet. App. 29a n.23; see also *NLRB v. Copps Corp.*, 458 F.2d 1227, 1229 (7th Cir. 1972); *QIC Corp.*, 212 N.L.R.B. 63, 66-68 (1974); *International Chemical Workers Union*, 200 N.L.R.B. 341, 342-347 (1972); *L.H.C., Inc.*, 195 N.L.R.B. 989, 992 (1972).

employee of a union, Section 302(c)(1) specifically excepts from that ban monetary payments made "to any * * * employee of a labor organization, who is also an employee * * * of such employer, as compensation for, or by reason of, his service as an employee of such employer." 29 U.S.C. 186(c)(1). That provision thus recognizes that a worker can simultaneously be a paid "employee" of both a union and another employer. See *Willmar Electric Service, Inc. v. NLRB*, 968 F.2d 1327, 1329 (D.C. Cir. 1992), cert. denied, 113 S. Ct. 1252 (1993); cf. *BASF Wyandotte Corp. v. Local 227, Int'l Chemical Workers Union*, 791 F.2d 1046, 1048-1053 (2d Cir. 1986) (noting relationship between NLRA and LMRA). The Board's interpretation that a paid union organizer is an "employee" within the meaning of Section 2(3) is therefore rational and consistent with the text, structure, and history of the Act, and any contrary interpretation would be inconsistent with that text, structure, and history.

B. A Worker For Hire Whom A Union Pays To Organize An Employer's Work Force Does Not "Abandon" Or Act In Conflict With His Duties To The Employer

In light of the significant guidance provided by the text of the Act, the court of appeals was wrong to disregard that text (and the Board's interpretation of it) and to rely instead solely on common-law principles of agency to determine whether a paid union organizer is a statutory "employee." But, in any event, treating a paid union organizer as an "employee" does not offend those common-law principles, as the Board has recognized. Pet. App. 32a-40a.

1. The court of appeals held that a worker's status as a paid union organizer is inconsistent with the principles

that an agent "has a duty to act solely for the benefit of his principal" (see 2 Restatement (Second) of Agency § 387, at 201 (1958)), may not act on behalf of "an entity whose interests conflict with those of the principal in matters in which the agent is employed" (see 2 *id.* § 394, at 219), and may "be the servant of two masters at one time only if service to one does not involve abandonment of or conflict with service to the other" (see 1 *id.* § 226, at 498). Pet. App. 8a. The court of appeals identified three ways in which hiring a paid union organizer purportedly conflicts with an employer's interests. None supplies a valid basis for concluding that a worker whom a union pays for organizing has "abandoned" or acted "in conflict" with his duties to his employer "master."

a. The court of appeals expressed concern, first, that a union might direct a paid union organizer to "increase his organizational activities at [the] employer's expense." Pet. App. 9a. But that concern does not justify excluding paid union organizers from the Act's coverage, for several reasons. First, the court's worry about a worker who may actively attempt to organize a work force would sweep far beyond the category of paid union organizers. If used as a basis for defining the term "employee," it would logically exclude workers who aggressively organize work forces for many other reasons: because they zealously believe in unionism, because they believe that unionizing a particular employer will increase their own wages and benefits, or because they wish to be in the good graces of union officials. It is simply of no consequence to the employer that an employee's motive to organize the workplace arises, in part, from monetary incentives.

More fundamentally, Section 7 of the Act, by giving an employee a protected right to organize, belies the court of appeals' tacit assumption that vigorous organizing is

inherently inconsistent with, or tantamount to abandoning, the employee's duties to the employer. As the Board explained, the core premise of the statute—that an employee has a right to organize—"is at war with the idea that loyalty to a union is incompatible with an employee's duty to the employer." Pet. App. 37a. Rather, "[t]he fact that paid union organizers intend to organize the employer's work force if hired establishes neither their unwillingness nor their inability to perform quality services for the employer." *Ibid.*⁹

Finally, recognizing as an "employee" a worker who is a paid union organizer in no way impedes the employer's ability reasonably to restrict union organizing so as to maintain discipline and productivity. Such workplace rules apply equally to paid and volunteer union organizers. See Pet. App. 34a, 38a (paid organizers are subject to same rules as other employees, and enjoy no "carte blanche in the workplace"). As this Court has explained,

[t]he Act, of course, does not prevent an employer from making and enforcing reasonable rules covering the conduct of employees on company time. Working time is for work. It is therefore within the province of an employer to promulgate and enforce a rule prohibiting union solicitation during working hours.

⁹ Indeed, at common law, so long as "the purpose of serving the master's business actuates the servant to any appreciable extent," the servant's conduct "may be within the scope of employment, although done in part to serve the purposes of the servant or of a third person." 1 Restatement, *supra*, § 236 & cmt. b, at 523-524. See *Ermert v. Hartford Ins. Co.*, 559 So. 2d 467, 477 (La. 1990); *Leeper Hardware Co. v. Kirk*, 434 S.W.2d 620, 624 (Tenn. Ct. App. 1968); *Leary v. Department of Labor & Industries*, 140 P.2d 292, 297 (Wash. 1943).

Such a rule must be presumed to be valid in the absence of evidence that it was adopted for a discriminatory purpose.

Republic Aviation Corp. v. NLRB, 324 U.S. 793, 803 n.10 (1945) (quoting *Peyton Packing Co.*, 49 N.L.R.B. 828, 843 (1943)). An employer also remains free to fire an employee who was a paid organizer for any otherwise-lawful reason apart from the employee's union affiliation and activities. See *Edward G. Budd Manufacturing Co. v. NLRB*, 138 F.2d 86, 89-91 (3d Cir. 1943) ("an employer may discharge an employee for a good reason, a poor reason or no reason at all so long as" the discharge is not motivated by unlawful considerations), cert. denied, 321 U.S. 778 (1944).¹⁰

Employers do have a valid interest in hiring persons who are less likely than others to violate work rules. However, the Board considered that interest and found that, in its experience, there is no evidence that paid union organizers are more likely than unpaid union organizers to violate work rules. On the contrary, the Board observed, precisely because a paid union organizer applies for a nonunion job in order to give himself an opportunity to organize the work force, "engaging in conduct warranting discharge would be antithetical to

¹⁰ Contrary to the court of appeals' suggestion (Pet. App. 9a), termination of a paid union organizer for just cause would not constitute an unfair labor practice. See *Anthony Forest Products*, 231 N.L.R.B. at 977-979; *NLRB v. Henlopen Manufacturing Co.*, 599 F.2d 26, 29-30 (2d Cir. 1979). But to the extent that the court of appeals viewed increased organizational activity of a union-member employee as an instance of such misconduct, it erred. The Act protects such organizational activities so long as they are confined to nonwork hours and do not otherwise interfere with discipline or production. See *Republic Aviation*, 324 U.S. at 803 n.10; *Beth Israel Hosp.*, 437 U.S. at 491-492.

th[at] objective." Pet. App. 37a; see *ibid.* ("No body of evidence has been presented that would support any generalized, or specific, finding that paid union organizers as a class have a significant, or indeed any, tendency to engage in such conduct."); *id.* at 38a (in the absence of "objective evidence," the Board will refuse to "infer a disabling conflict or presume that, if hired, paid union organizers will engage in activities inimical to the employer's operations").¹¹ The court of appeals had no basis for substituting its assumptions about the incidence of workplace infractions by particular classes of employees for the experienced judgment of the Board.¹²

¹¹ The Board has ruled that, in the discrete context of an ongoing strike, an employer may refuse to hire a paid union organizer. See *Sunland Construction*, 309 N.L.R.B. at 1231. An employer has a "substantial and legitimate" interest in refusing to place on the payroll a person who realistically would immediately begin encouraging other employees to withhold their services, the Board explained, and it is rational to presume that a paid member of a union "that is seeking to induce employees to withhold services would not be inclined wholeheartedly to provide services for the duration of the organization's efforts." *Id.* at 1231 & n.41. The basis for that ruling was not, however, that the paid union organizer is a non-"employee," but, rather, that an employer's refusal to hire a union organizer who applied for work during a strike does not violate Section 8(a)(1) and (3) of the Act. Apart from the strike situation, however, the Board has found no "inherent conflict between carrying out the duties of an employee and operating as a paid union organizer." *Id.* at 1231 n.41. Rather, "[t]he aim of inducing fellow employees to join a union is entirely consistent with being a competent employee who obeys work rules such as those time-and-place restrictions on union solicitation that are lawful" under the Act. *Ibid.*

¹² The Board properly rejected respondents' attempt to analogize a job applicant who is a paid union organizer to an outside union organizer. Pet. App. 37a-38a & n.34. An employer may ordinarily exclude an outside union organizer from his

b. The court of appeals also stated that hiring a paid union organizer could infringe upon the employer's interest in having non-transitory employees, because a union could direct the paid organizer to resign altogether. Such "control over a putative employee's job tenure," the court of appeals stated, "is inimical to, and inconsistent with, the employer-employee relationship." Pet. App. 10a; see *id.* at 9a.

The court of appeals failed to recognize, however, that an employer who has a genuine (not pretextual) interest in ensuring longterm employment may guard against employee transience by other means. Most obviously, the employer may refuse, pursuant to a union-neutral policy, to hire applicants who are likely to be temporary or transitory workers. To this end, an employer may ask an applicant whether there is any obstacle (including, for example, a pending application with another employer, a

premises, because, as this Court has explained, the Act accords such an outsider only a derivative Section 7 right. Only where employees are otherwise physically inaccessible to union organizers does the interest of those employees in obtaining information about unionization dictate giving an outside organizer such access. See *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105, 112-113 (1956); *Lechmere*, 502 U.S. at 537. By contrast to such an outside organizer, the Board explained, a worker for hire or an applicant for such a position is an "employee," and thus is statutorily protected against antiunion discrimination. Pet. App. 37a n.34. Indeed, the Board noted, a paid union organizer who is working for hire "arguably poses no greater threat to an employer's property rights than a prounion employee who voluntarily engages in organizational activity." *Ibid.*; see *Willmar Electric*, 968 F.2d at 1330 (paid union organizer's status as "employee" does not conflict with *Babcock & Wilcox* and *Lechmere*, for while the paid union organizer's employment "would give him a better perch from which to propagandize * * *, [that] would [also] be true for any union zealot who got a job with [the employer]").

family or personal commitment, or a scholastic obligation) that could inhibit the applicant from serving for a given duration. Provided that the employer applies such a durational standard on an evenhanded basis, it is free not to hire a paid union organizer applicant who fails to meet that standard. See *Willmar Electric*, 303 N.L.R.B. at 246 n.2 ("An employer may * * * lawfully refuse to hire a statutorily protected employee applicant, including a paid union organizer, on the basis of a *nondiscriminatory* policy against hiring any individual who, for example, seeks only temporary employment, applies while working for another employer, or intends to work simultaneously for more than one employer."); see also Pet. App. 36a n.32. Indeed, as this Court emphasized in *Phelps Dodge*, where it first held that a job applicant is an "employee" under the Act, the Act does not require employers to favor union members in hiring or infringe upon "the normal exercise of the right of the employer to select its employees." 313 U.S. at 187. Rather, the Act "is directed solely against the abuse of that right by interfering with the countervailing right of self-organization." *Ibid.* An employer may also design its compensation scheme, pension plan, and other contractual terms to encourage longevity of employment. In short, there is no need to classify a paid union organizer as a non-"employee" in order to protect an employer's legitimate interest in avoiding undue turnover within its work force.

An employer who does not take these steps and instead simply hires employees at will, however, has only itself to blame if an employee exercises his right to resign, whether impelled to leave by personal considerations, drawn by superior opportunities elsewhere, or directed to resign by a union. Indeed, at common law, employment contracts for an unspecified duration of time were

familiar, and have long been viewed as creating an "at will" relationship which either the employer or the employee may terminate at any time and for any reason. See, e.g., *Gilbert v. Tulane Univ.*, 909 F.2d 124, 126 (5th Cir. 1990); *Broussard v. Caci, Inc.—Federal*, 780 F.2d 162, 163 (1st Cir. 1986); *Buian v. J.L. Jacobs & Co.*, 428 F.2d 531, 533 (7th Cir. 1970); see also Summers, *Individual Protection Against Unjust Dismissal: Time for a Statute*, 62 Va. L. Rev. 481, 484-485 (1976). Thus, the common-law principle that a servant may not "abandon" one master for another (Pet. App. 8a (citing 1 Restatement, *supra*, § 226, at 498)) simply has no relevance where the "servant" employee does no more than exercise a right to cease employment.¹⁸

In its decision, the court of appeals placed "controlling" weight on the Union's "job salting organizing resolution," under which its members who applied for nonunion jobs had agreed to leave the employer "immediately upon notification." Pet. App. 10a. Reliance on that resolution was misplaced, for two reasons. First, as we have noted, an employer who genuinely wishes not to hire transitory workers is free to inquire, pursuant to a union-neutral policy, whether there is anything that

¹⁸ The contract that respondents offered to union-organizer Hansen in this case had no specified duration. J.A. 191-192. Consistent with common law, under state law such a contract created an employment relationship that was terminable at will by either party. See *Miller v. CertainTeed Corp.*, 971 F.2d 167, 172 (8th Cir. 1992) ("Under Minnesota law, the normal employer-employee relationship is at will[,] [and] [a]n employee is free to leave the job at any time."); *Pine River State Bank v. Mettelle*, 333 N.W.2d 622, 627 (Minn. 1983) (where employee is hired for an indefinite term, employment is "at-will"). Having offered such a contract, respondents may not credibly contend that they had an overriding interest in discouraging transitory employment.

could lead an applicant to cease employment prematurely. The resolution thus created no inherent conflict between the Union's demands and the employer's interests.

Second, the salting resolution did no more than exempt union members from a provision in the Union's constitution, which—like provisions in the constitutions or bylaws of most unions—forbade members from working for nonunion employers. Pet. App. 46a-47a, 62a; J.A. 249-256. The resolution language quoted by the court of appeals merely reserved the Union's right to rescind that exemption. The court of appeals' conclusion that the control by a union over a worker reflected in the resolution rendered the worker a non-"employee" (Pet. App. 10a) would thus cast doubt on the "employee" status of the many union members whose unions have permitted them to remain in the union while working for nonunion employers, subject to the union's right to insist that they resign such employment. See *Florida Power & Light*, 417 U.S. at 793. In any event, it is not correct that a union that reserves the right to demand that a member leave a nonunion job has absolute "control" (Pet. App. 10a) over that member's job tenure with an employer. A union will often have considerable leverage over one of its members, whether or not it pays him to organize, either because union membership makes it easier to obtain future jobs in the industry, or because the union's financial arrangements with members (*i.e.*, pension plan terms) reward continuous membership. However, faced with an ultimatum to resign from a nonunion job, the union member is always free to leave the union instead, and will decide based on his appraisal of the ramifications of the alternative courses.

c. The court of appeals also theorized that a paid union organizer who applies for work "not for financial

gain," but out of a motive to organize an employer's work force, may not be "loyal" to the employer. Pet. App. 8a-9a. The court relied on that concern in the portion of its opinion discussing the two full-time union officials who had applied to work for respondents. It did not make that point with regard to the remaining union-organizer applicants, who were unemployed. But the suggestion by the court of appeals that an applicant's or worker's motivation to engage in union organizing may be an indicator of future "disloyalty" to the employer could logically disqualify from being "employees" all workers who are avowedly pro-unionization. An employer may certainly adopt union-neutral hiring standards and disciplinary rules to ensure that employees are maximally committed to the work venture. If the employer genuinely believes that workers who hold other jobs are likely to perform at substandard levels, he may ban or restrict employee moonlighting. If the employer genuinely believes that employees who are already financially comfortable by virtue of second jobs or wealth are less driven to work hard, he may refuse to hire such persons. And the employer may punish detrimental "disloyal" conduct not inherently connected to union affiliation or organizing. See *NLRB v. Local Union No. 1229, Int'l Bhd. of Electrical Workers (Jefferson Standard)*, 346 U.S. 464, 472-477 (1953) (upholding discharge of employee for disparagement of employer's product); *Crystal Linen & Uniform Service, Inc.*, 274 N.L.R.B. 946, 948-949 (1985) (upholding discharge of employee for accepting employment with competitor and for steering customers to competitor). But an employer may not simply infer such disloyalty from the fact that, in taking a job, an applicant or worker is motivated actively to engage in protected organizing activities. See *Republic Aviation*, 324 U.S. at 803 n.10; *Texaco, Inc. v. NLRB*, 462

F.2d 812, 814 (3d Cir.) (employer may not insist that employees forgo organizational activities, or treat such activities as evidence of disloyalty), cert. denied, 409 U.S. 1008 (1972); *Abbey's Transp. Services, Inc. v. NLRB*, 837 F.2d 575, 581 (2d Cir. 1988) (employer may not terminate union activist who had successfully organized work force by claiming disloyalty). As we have noted, the Board has found no evidence that paid union organizers are more disruptive than other workers. Pet. App. 37a.¹⁴

2. The interpretation of the term "employee" adopted by the court of appeals would also yield anomalous results and frustrate central policies of the Act. Deeming a worker for hire a non-"employee" if he is to be paid for his organizing activities would remove from the statute's coverage not only job applicants, but also

¹⁴ The Board rejected a final theory, relied upon by the Fourth Circuit in *H.B. Zachry Co v. NLRB*, *supra*, as to why requiring employers to treat paid union organizer applicants by the same standards as other applicants could injure employers: that such a rule could enable unions to "pack[] bargaining units with their paid functionaries." Pet. App. 36a; see *Zachry*, 886 F.2d at 75. As the Board noted, under its rules for voting eligibility in representation elections, "employee status is not synonymous with voter eligibility," and, accordingly, paid union organizers may be excluded from voting where those organizers are "temporary" employees or share no community of interests with other employees. Pet. App. 35a-36a (citing *Multimatic Products*, 288 N.L.R.B. at 1316); see *Willmar Electric*, 968 F.2d at 1330 (paid union organizer's "qualification as an 'employee' is not the same as eligibility to vote"); see also *NLRB v. Trump Taj Mahal Associates*, 2 F.3d 35, 38 (3d Cir. 1993) (approving exclusion from voting of employees who have no reasonable expectation of working in the same workplace in the future); *Friendly Ice Cream Corp. v. NLRB*, 705 F.2d 570, 581 (1st Cir. 1983) (approving exclusion from voting of temporary employees). The court of appeals in this case did not rely on that concern.

paid union organizers who have begun work, and persons who, during their employment, have taken on the role of a paid union organizer. To deem an on-the-job worker who meets every conventional test of employee status not to be an "employee" simply because a union will pay him for organizing would confound the common understanding of that term. See, e.g., *Black's Law Dictionary* 525 (6th ed. 1990) ("[e]mployee" encompasses any "person in the service of another under any contract of hire * * * where the employer has the power or right to control and direct the employee in the material details of how the work is to be performed"). Under the court of appeals' interpretation, a mere job applicant is an "employee" protected against antiunion discrimination, but, anomalously, a person who is actually working for pay and being treated by an employer in every material respect as an employee may not be.

The court of appeals' interpretation of the term "employee" also has the effect of leaving workers unprotected against blatant acts of antiunion discrimination, as illustrated by the treatment in this case of union member Malcolm Hansen. Hansen, an unemployed journeyman electrician, was hired to a contract of indefinite duration by respondents. There is no indication that he (or any of the other paid union organizers involved in this case) was unqualified or unwilling to perform his duties for respondents. During the two days that he worked for respondents before being fired, Hansen was a prototypical worker for hire: he worked for an hourly wage, he was subject to respondents' discipline and control in the workplace, and respondents (presumably regarding him as an employee) withheld Social Security and income tax payments from his paycheck. J.A. 201-202.

Respondents fired Hansen because he attempted during work breaks to organize other employees, as the ALJ and the Board found. Because such employee conduct is protected under Section 7 of the Act, Hansen would ordinarily have been entitled to reinstatement and backpay for the discriminatory dismissal. However, because Hansen was receiving additional pay from the union, the court of appeals held that he was not an "employee," and that respondent's antiunion conduct was therefore lawful. There is no reason to believe that Congress intended that result. On the contrary, the court of appeals' interpretation impedes Congress's "central purpose" of enabling workers to organize themselves, *Phelps Dodge*, 313 U.S. at 193, and of "encouraging and protecting the collective-bargaining process." *Sure-Tan*, 467 U.S. at 892. The ruling in this case is particularly disruptive of Congress's goal of deterring antiunion discrimination because such discrimination was the only basis for firing Hansen and for not hiring his fellow union members—the knowledge that Hansen and the applicants were paid union organizers, or were subject to the union's salting resolution, was acquired only afterwards. See Pet. App. 85a; Town & Country C.A. Reply Br. 4; compare *McKennon v. Nashville Banner Publishing Co.*, 115 S. Ct. 879, 884-885 (1995) (evidence of employee's wrongdoing acquired after her termination does not defeat employer's liability for violating Age Discrimination in Employment Act of 1967).

Finally, the court of appeals' reasoning could have far-reaching adverse consequences. Other federal statutes accord protection to "employees" against various types of discrimination—on account, for example, of race, gender, and age. See, e.g., Section 701(f) of the Civil Rights Act of 1964, 42 U.S.C. 2000e(f); Section 11(f) of

the Age Discrimination in Employment Act of 1967, 29 U.S.C. 630(f). Yet those statutes often supply no more precise definition of the term "employee" than does the Act. If that term were given the meaning that it was given by the court of appeals, applying common-law principles of agency, paid union organizers would be deprived of federal protection against race, gender, and age discrimination by employers, including, for example, protection against sexual harassment on the job. Moreover, the court of appeals' interpretation of the term "employee" would similarly call into question whether a worker for hire who happens to be a paid union organizer is covered by the Fair Labor Standards Act of 1938, 29 U.S.C. 201 *et seq.*, the Occupational Safety and Health Act of 1970, 29 U.S.C. 651 *et seq.*, the Employee Retirement Income Security Act of 1974, 29 U.S.C. 1001 *et seq.*, or the Federal Employers' Liability Act, 45 U.S.C. 51 *et seq.*, among many other federal laws that relate to "employees." The very breadth of Section 2(3)'s definition of "employee" as being "any employee" strongly suggests that (except where one of Section 2(3)'s explicit exceptions applies) the term "employee" is no more constricted under the National Labor Relations Act than in its familiar, common-sense usage under these numerous other federal statutes.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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In The
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NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

TOWN & COUNTRY ELECTRIC, INC., et al.,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Eighth Circuit

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QUESTION PRESENTED

Whether the National Labor Relations Board reasonably determined that a person applying for or holding a job with an employer that he intends to organize, and who will be compensated by a union for his organizational activity, is an "employee" within the meaning of Section 2(3) of the National Labor Relations Act (29 U.S.C. 152(3)) and therefore protected against discrimination on account of his union activity and affiliation.

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1994

No. 94-947

NATIONAL LABOR RELATIONS BOARD,
v. *Petitioner,*

TOWN & COUNTRY ELECTRIC, INC., *et al.*,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Eighth Circuit

BRIEF FOR INTERNATIONAL BROTHERHOOD
OF ELECTRICAL WORKERS
LOCAL 292 *

OPINIONS BELOW

The opinion of the Eighth Circuit appears in the Appendix to the Petition for a Writ of Certiorari (Pet. App.) at pp. 1a-11a and is reported at 34 F.3d 625. The decision and order of the National Labor Relations Board and the decision and recommended order of the administrative law judge appear at Pet. App. 12a-135a and are reported at 309 N.L.R.B. 1250.

* The International Brotherhood of Electrical Workers Local 292 was the Intervenor/Respondent in the court below and is, under Rule 12.4 of the Court's Rules, a party in this Court. This brief supports the position being taken by the petitioner and is therefore filed in tandem with the filing of the petitioner's brief.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). The petition for writ of certiorari was timely filed.

STATUTORY PROVISIONS INVOLVED

Section 2(3) of the National Labor Relations Act (Act), 29 U.S.C. § 152(3), provides:

The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless this [Act] explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act [45 U.S.C. § 151 et seq.], as amended from time to time, or by any other person who is not an employer as herein defined.

STATEMENT

1. The Facts

(a) Town & Country Electric, Inc. ("Town & Country") is the largest non-union electrical contractor in Wisconsin. In early September 1989, Town & Country obtained a contract for electrical renovation work at a paper mill in International Falls, Minnesota, with work scheduled to commence on Monday, September 11, 1989. Under Minnesota law, at least one electrician with a valid state journeyman's license must be employed for every two unlicensed electricians performing work on a job. Pet. App. 15a.

Town & Country, which did not employ any electricians with Minnesota licenses, retained Ameristaff, an employee leasing agency, to recruit electricians for the project. Ameristaff placed an advertisement in a Minneapolis newspaper seeking "licensed journeymen electricians." *Id.* at 15a-16a. Town & Country had informed Ameristaff that the project would be considered a "short-term" job and that applicants had to be willing to work on a non-union project. Accordingly, Ameristaff questioned persons who responded to the advertisements about their union affiliations, and then invited seven applicants to interviews at a Minneapolis hotel on September 7, 1989. *Id.* at 50a-52a. Officials from Town & Country and Ameristaff travelled from Wisconsin by chartered airplane for the September 7 interviews in Minneapolis. *Id.* at 52a.

(b) Members of Locals 292 and 345, International Brotherhood of Electrical Workers ("IBEW") learned of the job openings. Although the IBEW constitution generally prohibits members from working for a contractor not signatory to a union contract, the locals had adopted an exception to that policy, and permitted unemployed members to work for non-union contractors and to attempt to organize the jobsite.¹ The locals also had a fund to reimburse members who accepted such jobs for the difference between union scale and the lower wages and fringe benefits paid by non-union contractors. Pet. App. 16a.

Approximately a dozen Local 292 members went to the hotel where Town & Country was interviewing on September 7 to apply for jobs. Two of the members were journeymen electricians who were full-time union officers; the rest were licensed, journeymen electricians who were

¹ The Local 292 resolution that permits work for non-union contractors, quoted in the Eighth Circuit's opinion (Pet. App. 9a-10a), has since been amended. For the Court's information, the new resolution appears as an Appendix to this Brief.

unemployed. *Id.* at 53a, 60a. (One of the seven applicants with pre-scheduled appointments also was present.) All of the prospects were asked to fill out applications. Town & Country began by interviewing a Local 292 member, who had told them he needed to leave early. The applicant with an appointment was then interviewed, but not hired. *Id.* at 54a-55a.

Ameristaff's president, who was at the hotel interviews, reviewed the remaining applications, which listed prior jobs with union-signatory contractors at union scale pay *Id.* at 60a; Jt. App. 226-27. He then informed the applicants that the job in question was non-union. The applicants responded that they were interested in any available work. Pet. App. 55a. After Ameristaff's president told the Town & Country interviewers that the remaining applicants appeared to be union members, further interviews were abruptly cancelled. *Id.* at 160a. The applicants were told that they could not be interviewed because they had no appointments. *Id.* at 55a-56a.

At that point, although no licensed electricians had been hired, the project was to begin in four days, and a dozen licensed journeymen were present, the interviewers prepared to fly back to Wisconsin. According to Town & Country, the sudden decision to cancel further interviews was made so that its Manager of Human Resources would not be late for an afternoon meeting back in Wisconsin. *Id.* at 18a.

(c) Malcolm Hansen, an unemployed, licensed journeyman who had been an IBEW member for 28 years, objected to the cancellation of the interviews. Hansen stated that he had called Ameristaff that morning and been told to show up at the hotel. After verifying that Hansen was telling the truth, Town & Country agreed to interview Hansen, but not anyone else. Pet. App. 18a-19a, 79a. At the interview, Hansen stated that he was a union member, but that he would accept employment with Town & Country. Hansen was given a job "out of [Town & Country's]

desperation, with knowledge of his union history." *Id.* at 77a. The ALJ found that:

Hansen was a rank-and-file union member, who served that body in no official capacity. From all appearances, he was dependent financially on employment as a journeyman electrician in the construction industry. . . . Hansen's intention to organize was not incompatible with his basic employment needs and objectives [Pet. App. 107a.]

Hansen testified that he did not even learn that he would be reimbursed by Local 292 for the difference between non-union wages and union scale until after his employment with Town & Country ended. Jt. App. 68

(d) Hansen began work on the International Falls project on September 12. He was the only licensed electrician on the job site, and state inspectors allowed the project to go forward only because Hansen was present. On the first day of work, Town & Country gave Hansen a raise. After three days on the job, Town & Country terminated Hansen. Pet. App. 80a, 82a-85a.

Town & Country employees offered differing accounts of why Hansen was terminated, attributing the decision to Hansen's alleged failure to wear a hardhat, failure to have the proper shoes, low productivity, poor workmanship, inability to measure pipe, breakage of drill bits, saw blades, and a company band saw, and fomenting of "disharmony" among the crew. *Id.* at 86a-121a. The ALJ found that the attacks on Hansen's job performance were "a composite of lies" (*id.* at 110a), and that the only "disharmony" caused by Hansen stemmed from his protected union organizing activities, which Hansen refused to discontinue. *Id.* at 118a, 121a.

After Hansen's discharge, he received a payroll check from Ameristaff for his three days of work on the project, with federal social security contributions deducted. Jt. App. 201.

2. Proceedings Below

(a) *The Board*: The NLRB General Counsel issued a complaint on November 16, 1989, charging Ameristaff and Town & Country Electric as joint employers with violation of §§ 8(a)(1) and (3) of the National Labor Relations Act, 29 U.S.C. § 158(a)(1) and (3) by refusing to interview and consider for hire the union members who applied on September 7, and by discharging Malcolm Hansen after three days on the job because of his union organizing activities.

After a hearing, the Administrative Law Judge concluded, first, that the employers' excuses for the refusal to interview most of the union members were simply "false plank[s] in [an] attempt to structure an explanation disassociating the sudden termination of the interview from disclosure that the waiting applicants were union members." Pet. App. 67a. The ALJ concluded further that the union members who filed applications would have been interviewed and considered if they had not been affiliated with the union. *Id.* at 69a.

Additionally, the ALJ, after exhaustively surveying the evidence, determined that Hansen "would [not] have been removed . . . if he had not engaged in organizational activity," and that Town & Country's attempt to establish otherwise "was structured on a thinly veiled attempt to mislead as to the true reasons for [their] action." *Id.* at 121a.

The ALJ as well rejected the employers' contention that the union members discriminated against were not "employees" within the meaning of the Act. *Id.* at 53a, 107a.²

² The employers' contention was that two of the applicants were not "employees" because they were full-time union officials at the time they applied for work on the Boise Cascade project while the remaining discriminatees, including Hansen, were not "employees" because they sought the job to further organizational interests and were entitled to reimbursement by the union for wage and benefit differentials between nonunion and union work. Pet. App. 53a-107a.

On these bases the ALJ held that the employers had violated §§ 8(a)(1) and (3) of the Act, and proposed appropriate relief. Pet. App. 128a-135a.

The employers' exceptions to the ALJ's decision included a reiteration of the argument that the employers were entitled to exclude the individuals in question in this case from employment on the Boise Cascade job with impunity because the discriminatees were not "employees" entitled to the Act's protections. The NLRB decided to hold oral argument in this case and another, *Sunland Construction Co.*, 309 NLRB 1224 (1992), in order to determine whether to adhere to its long-established understanding that individuals do not lose the Act's protections because they enter into employment with an intention to organize co-employees for a labor organization, or because they accept reimbursement from the union as consideration for their organizing efforts on the union's behalf. Pet. App. 13a. See, e.g., *Oak Apparel*, 218 NLRB 701 (1975). In addition to the respondents, the General Counsel, and the charging party (the union), the AFL-CIO and its Building and Construction Trades Department, the Chamber of Commerce of the United States, the Associated General Contractors and the Associated Builders and Contractors presented oral argument and (except for the Chamber) filed briefs. Pet. App. 13a.

The Board, on December 16, 1992, unanimously reaffirmed that individuals who work for an employer for a living and at the same time are "paid union organizers"³

³ Although the Board uses the generic term "paid union organizer" in its opinions, this category, as the facts of this case illustrate and as we discuss later, includes individuals with varying connections to the union, varying employment situations, and varying financial arrangements. Additionally, the Eighth Circuit's holding does not appear to turn at all on whether the individuals excluded as non-"employees" are paid at all, and there has never been any explanation by proponents of the exclusion of the relevance of union financial incentives. Consequently, we will use the Board's terms for now, in quotations, but will argue later that the position

are "employees" under the NLRA. Pet. App. 14a. Specifically, in considering whether there is any basis for abandoning its well-established doctrine, the Board noted, first, that the term "employee" is defined in the NLRA, § 2(3), 29 U.S.C. § 152(3), as "any employee . . . not limited to the employees of a particular employer", and that both the ordinary and common law definitions of "employee" encompass individuals who are paid wages for work performed, without regard to whether the individual is also engaged by someone else. *Id.* at 22a-33a.⁴ As to the purported policy reasons militating against the conclusion dictated by the statute's plain language, the Board emphasized that those reasons are largely based on premises squarely antithetical to those incorporated in the statute:

The right to organize is at the core of the purpose for which the statute was enacted. No coherent policy considerations to the contrary have been advanced that do not, on analysis, resolve themselves into arguments that employers be permitted to discriminate based on an individual's presumed or avowed intentions to join or assist a labor organization. . . .

The statute's premise is at war with the idea that loyalty to a union is incompatible with an employee's duty to the employer. The fact that paid union organizers intend to organize the employer's workforce

of the Eighth Circuit, and of the employers in this case, would actually exclude from the Act's protections an extremely wide range of committed union adherents who aid their unions' organizational efforts at their workplaces.

⁴ In all relevant regards, the Board opinions in this case and in *Sunland* are identical. The *Sunland* opinion went on to discuss an issue not raised by the facts of this case, namely, whether an employer is entitled to reject "paid union organizers" as employees during a strike. 309 NLRB at 1230-31. Additionally, Board members Oviatt and Raudabaugh each filed concurring opinions in *Sunland* and each concurred in this case "[f]or reasons set forth" in their concurring opinion in *Sunland*.

if hired establishes neither their unwillingness nor their inability to perform quality services for the employer.

. . . . The statute is founded on the belief that an employee may legitimately give allegiance to both a union and an employer. To the extent that may give rise to a conflict, it is a conflict that was resolved by Congress long since in favor of the right of employees to organize. [Pet. App. 33a-34a, 37a-38a].

Additionally, the Board noted that its ruling would not "give paid union organizers carte blanche in the workplace"; insofar as any union organizers or activists, paid or otherwise, "violate[] valid work rules, or fail[] to perform adequately, the organizer lawfully may be subjected to the same nondiscriminatory discipline as any other employee." *Id.* at 38a.

Member Oviatt, who had dissented in an earlier case from the Board's hold that a "paid union organizer" is an "employee" within the meaning of Section 2(3) (*Escada (USA), Inc.*, 304 NLRB 845 (1991), *enforced mem.* 970 F.2d 898 (3d Cir. 1992)), reconsidered that position as a result of the arguments in this case and *Sunland* and "decided to join the majority . . . to find that paid union organizer[s] . . . are 'employees' entitled to the Act's protections." *Sunland*, 309 NLRB at 1231. Recognizing that there are "significant disadvantages to the nonunion employer of having to hire a paid organizer" (*id.* at 1232), Member Oviatt nonetheless concluded that he "lack[ed] authority to exclude paid union organizers from the definition of 'employee'." *Id.* As he put in his conclusion, "the legislative materials and Supreme Court decisions interpreting those materials simply do not provide support for a policy judgment to exclude union organizers from the definition of 'employee'." *Sunland*, 309 NLRB at 1232: "Accordingly, I believe that if paid union organizers are now to be excluded, Congress must say so explicitly." *Id.*

Member Raudabaugh concurred specially as well, noting that the conclusion that given individuals are "employees" under the Act does not necessarily establish a violation of § 8(a)(3) of the Act in refusing to hire that individual, since "[i]n order to establish a violation of that section, it must be established that the employer's action was unlawfully motivated." 309 NLRB at 1232.

(b) *The Eighth Circuit*: On review, the Eighth Circuit refused enforcement. The Court of Appeals regarded the case as involving two separate classes of individuals, "the two full-time union organizers" and "the other nine union members, including Hansen." Pet. App. 5a.

With regard to the first category, the court below maintained, contrary to the Board's conclusion after surveying the common law materials, that under ordinary common law principles, an individual loses the *status* of employee if he or she has any conflict of interest with the employer. *Id.* at 8a. As to the Board's contention that an interest in organizing a union cannot, under the Act, be considered to evidence a breach of a duty of loyalty to the employer, the Eighth Circuit maintained that "[w]hen a union official applies for a position only to further the union's interests, we believe that an inherent conflict of interest exists." *Id.* at 8a-9a.

The Eighth Circuit further found that the union members who were *not* full-time union officers lost their status as "employees" because they were encouraged by their union, while unemployed, to apply for employment with Town & Country and to organize Town & Country's employees if hired. Pet. App. 9a. The sole basis for this holding was the provision of the union's organizing resolution (unknown to the employer at the time of the refusals to hire and discharge) which reinstates the unions' usual prohibition on union members' working for nonunion employers if the union determines that the organizing activity should cease. *Id.* at 9a-10a; Jt. App.

257. The Eighth Circuit viewed that provision as "controlling, for third-party control over a putative employee's job tenure, in contrast to, say, an employee-initiated decision to engage in a work stoppage, is inimical to, and inconsistent with, the employer-employee relationship." Pet. App. 10a.

SUMMARY OF ARGUMENT

The discriminatees in this case either actually performed or were prepared to perform economically valuable work for respondent, Town & Country Electric, Inc., under the company's sole direction as to the work tasks required, and to do so in exchange for wages. Ordinarily, individuals who have these characteristics are "employees" of an enterprise in ordinary parlance and for a wide variety of legal purposes, including the tax laws, tort law, and a myriad of employee protective statutes, state and federal.

The Eighth Circuit, however, held that where, as here, individuals who are otherwise employees have an arrangement with a union to actively organize fellow employees, that arrangement, depending upon its precise parameters, may divest the individuals of their employee status under the National Labor Relations Act (and, as far as appears, in all other legal contexts in which the same, traditional definition of "employee" used in the NLRA is applicable.) Specifically, the Eighth Circuit suggested that factors including pay for organizing activity by the union, taking an "employee" position with the intention to organize, an arrangement with the union to cease working as an employee at the union's instance, or the holding of a position as a union staff member before taking the "employee" position serve to divest the individual of NLRA "employee" status.

The consequences of this proposition, if adopted, are well illustrated by the facts of this case. Here, the employer was not aware, at the time it refused to hire the union member and union officer applicants and the later time it discharged Hansen, of any of the factors subse-

quently claimed to pretermite the discriminatees "employee" status. Rather, the employer acted with precisely the motive and effect proscribed by § 8(a)(1) and (3) of the NLRA; viz., from the intent to exclude union members from employment because of their union background, and to eliminate any activism on behalf of the union from its worksites, and succeeded in so doing. The question before this Court is whether there is any support in the statutory materials for the conclusion that the employer was privileged to behave in this way because the individuals excluded or removed from the workplace were not "employees." We submit that there is not.

I. (1) The usual rule that the plain words of a statute, construed according to their ordinary meaning, govern statutory construction has special force with respect to the interpretation of § 2(3) of the NLRA, which defines the term "employee." That section was originally construed by the Board, with this Court's approval, quite flexibly, by focussing on the purposes of the Act and the nature of the underlying economic relationship. *NLRB v. Hearst Publications*, 322 U.S. 111 (1944). In 1947, however, Congress rejected this approach, and dictated instead an interpretation of "employee" based upon ordinary usage and common law understandings. See *Allied Chemical & Alkali Workers v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 166 (1971); *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 518 (1992).

Dictionary definitions of the term "employee" include all those who work for another under the latter's direction and control of the particulars of the work in return for wages, and obviously cover the discriminatees here. The legislative history of the NLRA, both in 1935 and in 1947, shows that the § 2(3) term "employee" and the coverage of the NLRA was explained in precisely these broad terms. Moreover, the § 2(3) definition has several express exceptions, some from the original Wagner Act and others added in 1947. This Court has consistently concluded that absent either an express exception or the

clearest of indications that Congress intended an exception of a certain kind, § 2(3) covers, as it explicitly states, "any employee."

The common law as it existed in 1935 (and at present) is fully consistent with the dictionary definitions of "employee" and the way the term was used by members of Congress at the time of enactment. The Restatement of Agency, frequently relied upon by this Court as the source for determining common law "employee" concepts, defines an employee consistently with the ordinary usage already discussed, without regard to an individual's motives in seeking or retaining employment or any understandings with a third party with regard to that employment. And, the Restatement expressly recognizes that an individual can be the employee of two employers with respect to the same or closely related acts.

While the Eighth Circuit read the common law otherwise, its analysis suffered from three fatal errors: That analysis failed, first, to distinguish between determining employee status, and determining whether an employee has breached any employee duty. The employee in *McKennon v. Nashville Banner Publishing Co.*, 115 S. Ct. 879 (1995), for example, breached her duty of loyalty to her employer by taking confidential documents for her own use, but did not thereby lose her employee status as long as she continued to perform work for the employer in exchange for wages.

Second, the Eighth Circuit was wrong in suggesting that individuals such as Hansen in this case "abandon" their employment for the employing enterprise if they have an arrangement with the union that they will organize while employed. That arrangement in no way interferes with complete performance of the work assigned by the employing enterprise, and, according to common law understandings, the employee therefore has neither abandoned his job nor acted outside his scope of employment by undertaking the organizing activity for the union.

Finally, the notion that organizing on behalf of a union breaches an employee's duty of loyalty or constitutes an irreconcilable conflict with the employer's interest simply flies in the face of the NLRA. The Act expressly protects employees who engage in organizing activity from employer retaliation and thereby overrides any suggestion that such activity is a breach of a duty of loyalty to an employer.

II. Despite the clarity of the statutory materials, the employers in this species of case nonetheless have insisted that it is unfair and bad labor policy to treat individuals such as those here as § 2(3) employees. Any such arguments are, of course, more properly addressed to Congress. Moreover, for the most part the employers' articulated concerns, such as their concerns regarding adequate assurances of employee tenure can be dealt with through neutral rules applicable to employees generally that do not violate the NLRA.

The employer complaints that directly relate to the contested aspects of the relationship between the union and the employee-organizer are answered by the NLRA itself. For example, employers may not define loyalty or commitment so as to preclude employee union activities such as workplace organizing activity. Nor can the employer insist that such activities can be engaged in only by an employee who has no prior union commitments, or is not subject to any initial union influence or supervision. To the contrary, as the Board and this Court have long recognized, the Act affirmatively permits unions to establish, and enforce rules that advance legitimate union interests, subject only to the caveat that the union member is free to resign from the union and then disobey the rule. Similarly, it has long been understood that the NLRA protects the right to hold union office, and precludes employers from imposing special conditions on union officers not applicable to union members generally.

Finally, the federal labor policy precludes the theory that employees lose their NLRA protections because they are recompensed in some way for engaging in activities otherwise protected by § 7. Section 302 of the Taft-Hartley Act expressly recognizes that individuals who work for an employer may also be paid by a union to engage in legitimate union activity. Indeed, this Court has recognized repeatedly in cases concerning charitable solicitation under the First Amendment that regulating a group's practice of paying those who engage in communicative activity on its behalf as an incentive for them to do so is presumptively invalid, given the likelihood that such regulation will chill the communication and quash the message.

ARGUMENT

Introduction

The individuals in this case, and in similar cases in which employers have raised similar arguments, either actually performed economically valuable work for an enterprise, under the enterprise's sole control as to the work tasks involved, the place and hours of work, and all other ordinary, day-to-day matters concerning the job, and did so in exchange for wages (here, in the case of Hansen) or were prepared and qualified to do so (here, in the case of the discriminatees who were refused hire).

It is common ground that should such an individual after being hired not fulfill the expectations the enterprise has for its employees—because she, for example, proves incompetent or insubordinate—nothing in the National Labor Relations Act limits the enterprise's right to dispense with her services. *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 45 (1973).

Similarly, it is common ground that an enterprise that rejects such an individual as an applicant for employment *for a valid business-related reason*, including the reason that she would not perform her job task adequately, does not commit an NLRA violation. *Id.*; *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 186-87 (1941).⁵

At the same time—as this Court has recognized since the earliest days of the Act—where, as here, an employer

⁵ *Phelps Dodge* holds that it is a violation of what is now § 8(a)(3) of the Act, 29 U.S.C. § 158(a)(3)—which prohibits “discrimination in regard to hire or tenure of employment to encourage or discourage membership in any labor organization” (emphasis supplied)—for an employer to discriminate on the basis of union activity in hiring individuals who, if hired, would be “employees” within the meaning of § 2(3) of the Act. Because, under *Phelps Dodge*, the protection according applicants under the Act turns upon their employee status if hired, we refer to both the one union member who was hired and the many who were turned away as “employees.”

is engaged in purposely erecting an “embargo against employment of union labor,” the result is “notoriously one of the chief obstructions to collective bargaining.” *Phelps Dodge Corp.*, 313 U.S. at 186. That being so, said the Court, “[i]ndisputably, the removal of such obstructions was the driving force behind the enactment of the National Labor Relations Act.” *Id.*

And, it is equally well-settled that individuals hired by an enterprise as “employees” and covered by the NLRA have, while employed, the right to communicate with other employees regarding union organization during nonworking time, and to distribute union literature on nonworking time in nonworking areas, but not, if the employer adopts a valid “no solicitation” rule, to engage in union organizing activity during work time. *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945); *Beth Israel Hospital v. NLRB*, 437 U.S. 483, 491-94 (1978).⁶

Against this legal background, it is very much to the point that in ordinary parlance—and for every legal purpose of which we are aware—individuals who perform work on a behalf of an enterprise under the control of the enterprise as to the details of the work to be performed and as to conformance to valid workplace rules, and do so in exchange for wages, are “employees” and that the enterprise is an “employer.”

The enterprise as an “employer”, for example, is liable in tort as *respondeat superior* for any damage negligently caused by such an “employee.” See William L. Prosser *Handbook of the Law of Torts*, § 69 at p. 472 (3d ed. 1964). Under the tax laws, the enterprise as an “employer” is required to pay social security (FICA) and

⁶ The National Labor Relations Board's standards governing the validity of no-solicitation and no-distribution rules are presumptive only; employers may be able by presenting evidence of special circumstances to sustain broader prohibitions, See, e.g., *Beth Israel*, 437 U.S. at 494-95; *NLRB v. Baptist Hospital*, 442 U.S. 773, 779-80, 785 (1979).

federal unemployment (FUTA) taxes and to withhold income taxes for such an "employee." 26 U.S.C. § 3401(c) (income tax withholding); 26 U.S.C. § 3121(d) (FICA); 26 U.S.C. § 3306(i) (FUTA); *see also* Rev. Rul. 87-41, 1987-1 Com. Bull. 296.⁷ The Fair Labor Standards Act requires the enterprise as an "employer" to pay such an "employee" certain wages, including overtime past specified hours worked. 29 U.S.C. § 203(e), (g). The employment discrimination laws apply to such an "employee" as does the Family and Medical Leave Act. 29 U.S.C. § 630(f) (ADEA); 42 U.S.C. § 2000e(f) (Title VII); 42 U.S.C. § 1211(4) (ADA); 29 U.S.C. § 2611(3) (FMLA). The Occupational Safety and Health Act sets standards for the protection of such an "employee" from harm. 29 U.S.C. § 652(6). And, the Employee Retirement Income Security Act (ERISA) governs the provision of health, retirement, and other benefits to such an "employee." 29 U.S.C. § 1002(b).

The proposition adopted by the court below, however, and urged in this Court by the employers and *amici* appearing in their behalf is that certain relationships with a labor union can divest individuals, who are otherwise indistinguishable from other "employees," of their "employee" status.⁸

The aspect or aspects of the relationship with a labor union which results, under this theory, in divestment of

⁷ In this case, Hansen's paycheck from Ameristaff shows that Social Security taxes were, in fact, withheld from his pay. Jt. App. 201.

⁸ The Eighth Circuit did not indicate whether or not the individuals in question would also become, on its reasoning, non-employees with regard to the various other legal contexts described above in which employee status is relevant. As we show below, however, since the same concepts govern the determination of who is an "employee" in most of these contexts, the only logical conclusion is that the same exclusion from the protections (and responsibilities) of these various legal requirements would pertain in those contexts.

"employee" status are not clearly and carefully delineated in the decision below. But, as we understand that decision, it appears to rest on one or more of the following factors: (a) an agreement or understanding with the union (whether applicable to the individual alone or to union members generally) to enter into an employment relationship with an employer with the intention, once hired, to engage in union organizing activity (on non-work time and in the locations available to other employees for union activities under the NLRA); (b) union payment in any amount to the individual in consideration for engaging in any union-related activities at the workplace, whether or not the individual initially took employment with an intention to engage in such activities; (c) an agreement with the union to cease working for the nonunion employer at the union's direction, for union-related reasons; (d) union employment as an organizer, along with any of the foregoing circumstances.⁹

⁹ The many Board cases in which employers have contended, unsuccessfully, that pro-union individuals are not "employees" covered by the Act show a broad continuum of possible relationships, financial and otherwise, between those active in an organizing campaign and a labor union, that includes individuals: (a) who sought the job with the intention of organizing and would not receive compensation from the union, *e.g.* *Baltimore Steamship Packet Co.*, 120 NLRB 1521, 1533 (1958) (crew members accepted lower paying jobs to organize their co-workers); *Willmar Electric Service, Inc.*, 303 NLRB 245, 245 (1991) (union organizer who planned to take leave of absence from union while employed, and did not know if he later would be paid by union for his work); (b) who did not seek the job with the intention of organizing, later became active in an organizing campaign and were paid small amounts by the union for expenses or their time, *e.g.*, *Elias Bros. Big Boy, Inc.*, 139 NLRB 1158, 1164-65 (1962) (waitress paid \$15 per week by union as reimbursement for expenses); *Elias Bros. Big Boy, Inc.*, 137 NLRB 1057, 1073-75 & n.16 (1962) (waitress approached union about organizing co-workers and was paid \$20 to pass out leaflets); *Hollbrook Knitwear, Inc.*, 169 NLRB 768, 771 (1967); (c) who sought the job, in part, in order to organize their co-workers and also received

The Eighth Circuit unequivocally held that individuals in categories (c) and (d) are not NLRA "employees". It also held, seemingly, that individuals in category (a) are outside the Act without regard to whether or not they were previously paid union officials or are paid by the union while organizing. See Pet. App. 8a (individuals were not "employees" because they "wanted to enter Town & Country's work force not for financial gain, but to organize its workers.") And, while the Eighth Circuit opinion does not directly address the question whether simultaneous union pay alone divests an individual of "employee" status, the employers' arguments throughout the line of cases culminating in this case have stressed the *paid* status of the individual in question, and have made the receipt of union pay for organizing while on the job a primary basis for the claimed divestiture of § 2(3) "employee" status. See cases cited in note 9, *supra*.

None of these factors, it is important to note, have any bearing whatever on the individual's day-to-day per-

pay from the union, *e.g.*, *Sears, Roebuck and Co.*, 170 NLRB 533, 533, 535 n.3 (1968) (paid union organizer took the job "to organize and also to make some extra money"); *Dee Knitting Mills, Inc.*, 214 NLRB 1041, 1041 (1974); (d) who sought the job for the purpose of organizing their co-workers and were paid by the union, *e.g.*, *Margaret Anzalone, Inc.*, 242 NLRB 879, 884-86 (1979) (union organizer who was "a competent and versatile machine operator" while employed); *H.B. Zachary Co.*, 289 NLRB 838, 838 (1988) (union organizer who was praised for the quality of his work as a welder); *Columbia Engineers Intl.*, 249 NLRB 1023, 1028 (1980); *Henlopen Manufacturing Co.*, 235 NLRB 183, 184 (1978); and (e) who were full-time employees of the union, and apparently turned all wages earned over to the union, *e.g.*, *Oak Apparel, Inc.*, 218 NLRB 701, 702, 704-707 (1975) (paid organizers who, while employed, "performed their duties ably and diligently"); *Anthony Forest Products Co.*, 231 NLRB 976, 976-77 (1977); *Escada (USA) Inc.*, 304 NLRB 845, 845-47 (1991). Cf. *Lyondale Manufacturing Corp.*, 238 NLRB 1281, 1283 (1978) (paid organizer asked by union to obtain job in order to organize co-workers, but never engaged in organizing activities).

formance of job tasks for the employer, or on the individual's obligation to abide by all valid workplace rules established by the employer. Put another way, nothing in any obligation the individual assumes to the union by reason of any of these factors is inconsistent with full performance of all valid obligations imposed by the employer as a requirement of initial employment and as a precondition to continued employment.

Nonetheless, under the theory adopted below, where the pertinent factors singly or in some combination are present, the individuals affected—because not "employees" under the NLRA—can be refused employment or discharged by an employer in a manner that "interfere[s] with, restrain[s] or coerce[s] employees in the exercise of the rights guaranteed in section [7]", or on a basis that "by discrimination in regard to hire or tenure of employment . . . discourage[s] membership in any labor organization." §§ 8(a)(1) and (3), 29 U.S.C. §§ 158(a)(1) and (3).

In this case, for example, the employer was *not* aware of any of the factors that are now claimed to divest the discriminatees of the Act's protections: The applications for employment here made evident to the interviewers—who were aware of the union and nonunion status of competing employers—that the individuals in question were union members. See p. 4, *supra*. But nothing in those applications—or in those interviews which were held—indicated that the applicants were union officials, paid or unpaid; that their intention was to take the job in order to organize a union if hired; that they might at some indeterminate time in the future resign their employment at their union's behest; or that they would in any sense be paid by the union for union activities while employed. Further, as to Hansen, who was hired and then discharged for union activity, the evidence shows that the employer, in making the discharge, was aware only of Hansen's union membership and intent to organize his

co-workers (and, indeed, that Hansen himself was not aware, until after he was discharged, that the union planned to reimburse him for the difference between union and non-union wages). Jt. App. 68.

The employer's actual intention, as the Board found on these facts, was to refuse employment to union members *qua* union members, and to remove from its worksite any individual engaged in active lawful union organizing activity. Thus, as in *McKennon v. Nashville Banner Publishing Co.*, 115 S. Ct. 879, 885 (1995), decided this term under the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621 et seq.,

[this] case comes [to this Court] on the express assumption that an unlawful motive was the sole basis for the firing [and for the failure to hire] . . . The employer could not have been motivated by knowledge it did not have and it cannot now claim that the employee was fired [or not hired] for [a] non-discriminatory reason.¹⁰

And, under NLRA §§ 8(a)(1) and (3), as under the ADEA, "[i]t is the 'true purpose' or 'real motive' in hiring or firing that constitutes the test" for when discharges or failures to hire deter protected activities and thereby violate the Act. *Teamsters v. NLRB*, 365 U.S. 667, 675 (1961); *see also Radio Officers v. NLRB*, 347 U.S. 17, 43 (1954) ("true purpose is the subject of investigation" in discriminatory hiring and discharge cases), quoting *NLRB v. Jones & Laughlin*, 301 U.S. at 46.

In short, in this case *the employers fully intended to commit acts that violate a core premise of the statute, with the requisite bad motive.* According to the employ-

¹⁰ *McKennon* held that an employee does not lose the protections of the ADEA to be free of prohibited age discrimination where the employer finds out, after a discriminatory discharge, that there were grounds upon which the employee could and would have been fired before that discharge had the employer known about those grounds.

ers' theory, it is nonetheless the case that because the discriminatees are not "employees" covered by the Act, there was no violation of the Act. The question before the Court is whether there is any support in the statutory materials for this understanding of the term "employee." We submit that there is none whatever.

I. THE COURT OF APPEALS' CREATION OF AN IMPLICIT EXCEPTION TO THE NLRA § 2(3) "EMPLOYEE" DEFINITION HAS NO BASIS IN THE STATUTE OR ITS LEGISLATIVE HISTORY, AND IS INCONSISTENT WITH CORE NLRA POLICIES.

1. Since the court below held that the discriminatees in this case are not covered by the NLRA because they are not "employees," the pertinent section of the Act is the one that defines "employee", § 2(3). That definition reads as follows, in full:

The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless this subchapter explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act, as amended from time to time, or by any other person who is not an employer as herein defined. [29 U.S.C. § 152(3).]

It is a commonplace in statutory interpretation that "the starting point must be the language employed by Congress . . . and we assume that the legislative purpose is expressed by the ordinary meaning of the words used." *INS v. Phinpathya*, 464 U.S. 183, 189 (1984). *See*

United States v. Alvarez-Sanchez, 114 S. Ct. 1599, 1603 (1994); *Reves v. Ernst & Young*, 113 S. Ct. 1163, 1169 (1993). Indeed, “[a]bsent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive.” *Consumer Prod. Safety Comm’n v. GTE Sylvania*, 447 U.S. 102, 108 (1980).

For historical reasons, this general rule has special pertinence to the interpretation of NLRA § 2(3). For “the legislative history of § 2(3) itself” indicates that the term “employee” is to be interpreted in accord with “its plain meaning embracing . . . those who work for another for hire.” *Allied Chemical & Alkali Workers v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 166 (1971).

As explained in *Pittsburgh Plate Glass*, under the original Wagner Act, this Court, in *NLRB v. Hearst Publications*, 322 U.S. 111 (1944), took the view that the term “employee” in the statute is to be interpreted “in doubtful situations, by underlying economic facts rather than technically and exclusively by previously established legal classifications.” *Id.* at 129, quoted in *Pittsburgh Plate Glass*, 404 U.S. at 166-67.¹¹ In enacting the Taft Hartley Act in 1947, Congress rejected *Hearst’s* approach, based on “reference to the purpose of the Act and the facts involved in the economic relationship” (322 U.S. at 129), by amending the definition of “employee” in § 2(3) so as to exclude from the defined class “any individual having the status of an independent contractor.”

In so doing, the 1947 Congress, as *Pittsburgh Plate Glass* recounted, stated an intention that § 2(3) be interpreted “‘according to all standard dictionaries, according to the law as the courts have stated it, and according to the understanding of almost everyone’ . . . [as] someone who works for another for hire.” 404 U.S.

¹¹ The precise question before the Court in *Hearst Publications* concerned whether individuals regarded as independent contractors, not employees, under common law standards could nonetheless be considered “employees” under the NLRA.

at 167, quoting H.R. Rep. No. 245, 80th Cong., 1st Sess., 18 (1947). As the House Report on the 1947 amendments explained:

It must be presumed that when Congress passed the Labor Act, it intended words it used to have the meanings that they had when Congress passed the act, not new meanings that, 9 years later, the Labor Board might think up. . . . “Employees” work for wages or salaries under direct supervision. . . . It is inconceivable that Congress, when it passed the act, authorized the Board to give every word in the act whatever meaning it wished. On the contrary, *Congress intended then, and it intends now, that the Board give to words not far-fetched meanings but ordinary meanings.* [H.R. Rep. No. 245, *supra*, at 18, quoted in *Pittsburgh Plate Glass*, 404 U.S. at 167-68 (emphasis supplied).] ¹²

See also *NLRB v. United Insurance Co. of America*, 390 U.S. 254, 256 (1968) (“the obvious purpose” of the 1947 amendment to the definition of “employee” was “to have the Board and the courts apply general agency prin-

¹² The “independent contractor” amendment to the employee definition in the Taft Hartley Act originated in the House and had no analog in the Senate bill. The conference agreement incorporated the House amendment, with the House conference report indicating that in the future “ordinary tests of the law of agency” were to govern. H. Conf. Rep. No. 510 on H.R. 3020, 80th Cong., 1st Sess. (1947), reprinted in 1 NLRB, *History of the Labor Management Relations Act of 1947* (“LMRA Leg. Hist.”), at 536.

The Taft Hartley Act also amended the definition of “employer” and added a definition of “agent,” so as to incorporate for purposes of defining the responsibility of both employers and labor organizations “the ordinary common law rules of agency.” See H.R. Rep. No. 245, *supra*, at 11, 68, reprinted in 1 LMRA Leg. Hist. at 302, 359; see also H. Conf. Rep. No. 510, *supra* at 36, reprinted in 1 LMRA Leg. Hist. at 540. See also H. Conf. Rep. No. 510, *supra*, at 36.

Thus, the 1947 Congress determined that as to agency-related issues generally, traditional common law concepts were to govern under the NLRA.

ciples"); *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 518, 1349 (1992) (holding that in light of Congress' overruling of *Hearst* and the parallel overruling of *United States v. Silk*, 331 U.S. 704 (1947), "Congress means an agency law definition for 'employee' unless it clearly indicates otherwise").¹³ Thus, since 1947 the Board has been under specific Congressional directions to interpret the "employee" definition according to its plain language and against the traditional agency law understanding of the term.

2. Interpreted "according to all standard dictionaries, according to the law as the courts have stated it, and according to the understanding of almost everyone" (H.R. Rep. No. 245, *supra*, at 18), the language of the § 2(3) definition of "employee" fully supports the Board's conclusion that the discriminatees in this case would, once hired, be "employees" of the employers.

(a) First, the dictionary definitions reveal that the "ordinary meaning" of "employee" includes any individual "who is hired by another, or by a business firm, etc. to work for wages or salary," *Webster's New Universal Unabridged Dictionary*, 595 (1983); anyone "employed by another," "under wages or salary," *Webster's Third New International Dictionary*, 743 (rev. 1971); or anyone "who works for another in return for salary, wages, or other consideration," *Funk & Wagnalls Standard College Dictionary*, 433 (1973).

As noted, both Congress and this Court have adopted this broad and straightforward understanding of NLRA § 2(3), stating that the NLRA "employee" definition extends to that class of individuals "who work for another for hire." H.R. Rep. No. 245, *supra*, at 18; *Pittsburgh*

¹³ *Silk* had followed the *Hearst* approach in interpreting the term "employee" in the Social Security Act. For an account of the Congressional reaction to *Silk* and the subsequent amendment to the Social Security Act, see *United States v. W.M. Webb, Inc.*, 397 U.S. 179, 183-88 (1970).

Plate Glass, 404 U.S. at 166. This definition delineates a class which encompasses all individuals who are hired by an enterprise to perform labor for the enterprise's profit, under the enterprise's direction and supervision, and in return for compensation in wages from the enterprise. The definition does *not* look to the legal or financial relationships the individual may have with others, outside of the employee-employer relationship; nor to the individual's subjective motives for, or purposes in, entering into or continuing that relationship. Rather, the only question posed in applying the term "employee" is the objective one of whether the individual is performing labor for another as a hired worker.

Further, the legislative history of NLRA § 2(3) shows that Congress intended the term "employee" to have exactly the meaning these dictionary definitions provide. As passed in 1935, the structure and wording of NLRA § 2(3) were quite similar to the current version, although stating fewer specific categories of exceptions.¹⁴ While

¹⁴ As passed in 1935, § 2(3) stated as follows:

The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse. [49 Stat. 450 (1935).]

This language remains the beginning of § 2(3) as currently drafted, but the current version includes the following additional language, added in 1947, which establishes additional categories of individuals excluded from the definition of "employee":

, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act, as amended from time to time, or by any other

the legislative history of the provision contains no detailed analysis of its scope, the historical materials do contain repeated references to the broad underlying group of individuals intended to be covered. The repetitive refrain is that the Act uses the term "employee" to cover the general class of "workers", "wage earners" and "workmen" who perform labor in the workforces of "employers".¹⁵ Thus, for example, Representative Connery, the floor manager of the bill, affirmed that the coverage extended to "every man on a payroll," 79 Cong. Rec. 9686 (1935), *reprinted in* 2 NLRB, Legislative History of the NLRA of 1935 ("NLRA Leg. Hist."), at 3119 (1935); *see also* 2 NLRA Leg. Hist. at 3120 (coverage extends to "every individual on [the] employer's payroll").

The 1947 Congress likewise made it clear that under the amended § 2(3) the term "employee" was still to extend broadly to that class of people who "work[] for another for hire," or who "work for wages or salaries under direct supervision." H.R. Rep. No. 245, *supra*, at 18. There is nothing in the 1947 debates that would give any support to the notion that the term "employee" should be given any nontraditional meaning that would look to an employee's motivation for, or purpose in, working for an employer or to factors that are external to the objective relationship of the worker and the enter-

person who is not an employer as herein defined. [61 Stat. 137 (1947).]

The employers here have never argued that any of these exclusions are relevant to this case.

¹⁵ *See, e.g.*, Hearing on S. 1958 Before the Senate Comm. on Educ. and Labor, 74th Cong., 1st Sess. 42, 56, 78 (1935), *reprinted in* 1 NLRB, Legislative History of the NLRA of 1935 ("NLRA Leg. Hist."), at 1418, 1432, 1454 (1935); H.R. Rep. No. 969, 74th Cong., 1st Sess. 8 (1935), *reprinted in* 2 NLRA Leg. Hist., at 2917-18; 79 Cong. Rec. 9714, 9719, 9732-33 (1935), *reprinted in* 2 NLRA Leg. Hist., at 3186, 3198, 3230-32. *See also* H.R. Rep. No. 245, *supra*, at 13 (intent of Congress in passing the NLRA was to protect the welfare of "workers" and "wage earners").

prise for whom he works regarding the work to be performed.

The very language and structure of § 2(3) are the best evidence of Congress' intention to embrace *all* those who meet that objective test other than those specifically excepted in § 2(3) itself:

*The breadth of § 2(3)'s definition is striking: the Act squarely applies to "any employee". The only limitations are specific exemptions for agricultural laborers, domestic workers, individuals employed by their spouses or parents, individuals employed as independent contractors or supervisors, and individuals employed by a person who is not an employer under the NLRA. [Sure-Tan, Inc. v. NLRB, 467 U.S. 883, 891 (1984) (emphasis added).]*¹⁶

This Court has therefore consistently concluded that, absent some compelling reason otherwise, individuals who meet the ordinary dictionary definition of "employee" and who are not affirmatively excluded from the "employee" class in a § 2(3) exception, are covered by the NLRA.

For example, in *Sure-Tan, supra*, the Court rejected the contention that undocumented aliens—performing work for hire under an enterprise's supervision and control—should not be considered § 2(3) "employees": "Since undocumented aliens are not among the few groups of workers expressly exempted by Congress, they plainly

¹⁶ The Court's approach in *Sure-Tan* and other case reflects the well-established rule of statutory construction under which the "enumeration of exclusions from the operation of a statute indicates that the statute should apply to all cases not specifically excluded," 2A Singer, *Sutherland Statutory Construction* § 47.23 (1973 & Supp. 1983). Under this canon, there can be no doubt that the term "any employee" is to be given its broadest meaning, limited only by the statute's enumerated exceptions. The Court has followed this same rule of construction in interpreting the closely analogous definition of "employee" in the FLSA, 29 U.S.C. § 203(3). *See Powell v. United States Cartridge Co.*, 339 U.S. 497, 516-17 (1950) (same); *see also Bayside Enterprises, Inc. v. NLRB*, 429 U.S. 298, 299-30 (1977).

come within the broad statutory definition of 'employee.'" *Sure-Tan*, 467 U.S. at 892.

Similarly, *NLRB v. Hendricks County Rural Electric Membership Corp.*, 454 U.S. 170 (1981), refused an invitation to import into § 2(3) an exception for all employees having access to confidential business information, noting that "[u]nder a literal reading of the phrase 'any employee,' the workers in question are 'employees.'" 454 U.S. at 177.

The *only* occasion upon which this Court held that a group of individuals who might otherwise be "employees" are not within § 2(3) although not expressly excepted in the Act is *NLRB v. Bell Aerospace*, 416 U.S. 267 (1974). In that case, the Court concluded on the basis of, *inter alia*, "the Board's early decisions, the purpose and legislative history of the Taft-Hartley Act [and] consistent construction of the Act for more than two decades" (416 U.S. at 289) that Congress affirmatively evidenced an intention that managerial employees be excluded from the Act. *See also id.* at 274-75 (placing emphasis on the fact that Congress re-enacted the statutory definition in 1947 without change with an awareness of the Board's longstanding exclusion of managerial employees from the Act.)

Here, *none* of the factors relied upon in *Bell Aerospace* for adding an implied exception to the "employee" definition are present. No Board decision has ever recognized any categorical exception to the "employee" definition for individuals who by prearrangement act as union organizers, paid or otherwise. To the contrary, the Board has concluded that individuals who are otherwise "employees" do not lose that status because of organizing arrangements with a union. Here, as opposed to *Bell Aerospace*, there is simply no administrative exception to § 2(3) that the 1947 Congress could be said to have ratified.¹⁷

¹⁷ The Board's decisions on this issue date back to *Algonquin Printing Co.*, 1 NLRB 264, 267-70 (1936) and *Waumbec Mills, Inc.*,

In short, the plain language and structure of § 2(3) dictate that individuals who perform economically valuable work for an employer, under the employer's direction and control, and are paid wages for so doing—including individuals who have organizing arrangements with a union—are "employees" within the meaning of § 2(3) of the Act.

(b) "The law as the courts have stated it"—that is, the common law—mirrors the ordinary dictionary meaning of the term "employee."

The Restatement (Second) of Agency has been repeatedly referred to by this Court as "a guideline for analysis" with regard to "the general master-servant relationship" and, in particular, with regard to "analyzing the three-party relationship between two employers and a worker." *Kelley v. Southern Pacific Co.*, 419 U.S. 318, 324 (1974). The Restatement "defines a servant as 'a person employed to perform services in the affairs of another and who with respect to the physical conduct in the performance of the services is subject to the other's control or right to control.'" *Id.* at 324, quoting Restatement (Second) of Agency, § 220(1) (1957). *See also*, Restatement of Agency (First) § 220(1) (1937) (same); *Baker v. Texas & Pacific R. Co.*, 359 U.S. 227, 228 (1959) (relying on the Restatement as the primary source for defining the words "employee" and "employed" consistently with common law principles); *Ward v. Atlantic Coast Line Ry. Co.*, 362 U.S. 396, 400 (1960) (same).

Similarly, *Black's Law Dictionary*, drawing on common law authorities, defines "employee," as "[a] person in the service of another under any contract of hire, express or implied, oral or written, where the employer has the power or right to control and direct the employee in the material details of how the work is to be performed, . . .

15 NLRB 37 (1939), *enfd.*, 114 F.2d 226 (1st Cir. 1940), which involved present and former union officers, and continue, in an unbroken line of precedents, with the cases cited in n.9, pp. 19-20, *supra*, and through the present case.

[o]ne who works for an employer; a person working for salary or wages." See *Black's Law Dictionary* 471 (5th ed. 1979).

And, a leading legal encyclopedia states that, under the common law of agency, an employer-employee relationship is established whenever "one engages another to perform certain work, retaining control of the conduct of the person thus engaged with respect to the work to be done or the order, method, and plan of the work." 53 Am. Jur. 2d, Master and Servant, § 5 (1970).

None of these sources treats as remotely relevant any additional legal or financial relationships the worker may have with others, or any subjective motives or purposes that a worker may have regarding his employment. As long as the worker, once hired, continues to be employed to perform labor under those objective conditions normally associated with "employee" status, the worker continues to be an "employee" with respect to the labor in question.

That such additional relationships and such subjective motives are irrelevant was made explicit in the first Restatement of Agency, which was promulgated in 1933 and thus reflected "the meaning[] [of the "employee" concept] . . . when Congress passed the act." H.R. Rep. No. 245, *supra* at 18.¹⁸ On a point that is highly relevant here—and in a provision that was relied upon by the Board below (Pet. App. 28a)—the first Restatement made clear that "[a] person may be the servant of two masters, not joint employers, at one time as to one act, if the service to one does not involve abandonment of the service to the other." Restatement (First) of Agency § 226.¹⁹

¹⁸ The current version of the Restatement of Agency—the Second—is in all relevant respects identical to the Restatement (First) with regard to the "servant of two masters" issue. Compare Restatement (First) of Agency §§ 220, 226 (1933) with Restatement (Second) of Agency §§ 220, 226 (1957).

¹⁹ This Restatement section was cited approvingly in *Kelley*, *supra*, 419 U.S. at 322; see also *Williams v. Pennsylvania R. Co.*, 313 F.2d 203, 209 (2d Cir. 1963).

An illustration given in both Restatements makes clear how close the facts of the instant case are to the situation envisioned by the Restatements. The illustration discusses a delivery boy who simultaneously works for two employers making deliveries along the same route, with "neither [employer] know[ing] of the employment of the other." Despite the simultaneous employment arrangement, and despite the worker's failure to disclose the arrangement to either employment, the Restatement makes clear that the delivery boy is simultaneously an employee of both employers while riding along the common route. Restatement (First and Second) § 226 illus. 2.

The Restatement's explanation of this result is straightforward, and has nothing to do with any complex analysis of either employer's abstract interests: "[S]ince one can perform two acts at the same time," and since "a single act may be done to effect the purposes of two independent employers," the law recognizes simultaneous employment by independent employers, even where one or both of the employers are unaware of—and would disapprove of—the other employment relationship. *Id.*, cmt. a, "independent service for two masters".

A similar, and arguably even closer, illustration of simultaneous employment is given in Professor Seavey's leading treatise on the law of agency. Seavey gives the example of a police detective who obtains undercover employment as a waiter to investigate the customers of a restaurant. In such a circumstance, the treatise makes clear, the individual is an employee of both the city and the restaurant. See W. Seavey, *Handbook of the Law of Agency*, § 85 (1964) ("One can be a servant of one person for some acts and the servant of another for other acts, even when done at the same time, as where a city detective, in search of clues, finds employment as a waiter and, while serving the meals, searches the customer's pockets. In the first, he is servant of the restaurateur, in the second, of the city").

For present purposes, the pertinent point in Seavey's example is that the detective is the owner's employee for as long as he or she remains employed so that, for example, the owner is responsible if the detective trips a patron negligently while waiting tables (but not, apparently, if the detective rips a customer's pocket while searching it). As in Seavey's example, the fact that an employee-union organizer may undertake employment with an employer because doing so is essential to further his organizing aims does not change the conclusion that he is the employer's employee with respect to the work carried out on behalf of that employer during work time.

Thus, for tort purposes, for example, Town & Country would have been liable had Hansen negligently caused injury to a passerby while performing electrical work at the Boise Cascade site, since Hansen was working for the employer as an employee while performing that work. At the same time, had Hansen injured a fellow employee by negligently tripping him while soliciting for the union on nonwork time, the union might be liable, but Town & Country presumably would not be.

It is important to note that the Restatement goes on to specify that simultaneous employment arrangements may, depending on the circumstances, constitute a "breach of duty" by the employee with respect to "one or both" of his employers. Restatement (First and Second) § 226 cmt. a. But the Restatement authors could not be clearer that the issue of employee *status* is separate from the issue of employee *breach of duty*. As the Restatement explains, under the common law of agency, "[a] person . . . may cause both employers to be responsible for an act"—the person may have the status of "employee" with respect to both employers—even when the person has committed "a breach of duty to one or both of them." *Id.*²⁰

²⁰ Seavey's hypothetical is a possible example of a breach of duty by a dual employee, since the dual employment described

(c) Despite all this, the Eighth Circuit read the common law principles as supporting its conclusion, stating:

Under common law, an agent has a duty to act solely for his principal in all matters connected with his agency. Restatement (Second) of Agency § 387 (1957). More specifically, an agent is subject to a duty not to act on behalf of a person or entity whose interests conflict with those of the principal in matters in which the agent is employed. *Id.* § 394. Pursuant to this obligation, a person may be the servant of two masters at one time only if service to one does not involve abandonment of or conflict with service to the other. *Id.* § 226. Ordinarily, however, the control a master can properly exercise over the conduct of a servant prevents simultaneous service for two independent employers. *Id.* cmt. a. [Pet. App. 8a.]

Before analyzing the Eighth Circuit's common law discussion in detail, it is worth spelling out once more the consequences if this analysis is correct: The *same* common law concepts that govern "employee" status under the NLRA govern "employee" status in such diverse legal contexts as tax liability and *respondeat superior* responsibility in tort (*see pp. 17-18, supra*). If the Eighth Circuit were right in its analysis then Town & Country would have been absolved from paying social security taxes and FUTA taxes on Hansen's wages and, if Hansen's electrical work had been so negligent as to cause major damage to Boise Cascade's property, or to a passerby,

may well entail an inherent breach of duty to the restaurant owner giving rise to a cause for discharge. Put another way, poking into customer's pockets for the benefit of a third party would seem to be an obvious breach of one's duties as a waiter and a breach of a duty of loyalty to the restaurant owner. Under the NLRA, in contrast, organizing a union in accord with valid no-solicitation rules cannot be deemed a breach of an employee's duties or constitute a basis for discharge. *See pp. 40-41, infra.*

Town & Country would not have been liable for the damages caused.

The improbability of these results in itself strongly suggests that the Eighth Circuit's analysis cannot be correct. Not surprisingly, then, for three reasons, the Eighth Circuit's analysis of the application of common law principles to this case is quite simply a mischaracterization of those principles.

First, the Eighth Circuit's discussion of the common law of agency confuses the issue of employee *status* with the issue of employee *duty*. As we have explained, under the common law, an individual can simultaneously hold the status of employee with respect to more than one employer, even where the employee created this arrangement without the knowledge of one or more of the employers, and even where the employee's actions in this regard might constitute a breach of duty to one or more of the employers. See pp. 10-11, *supra*.

The Eighth Circuit ignored this distinction. Instead, that court quoted from sections of the Restatement concerning an employee's duties of loyalty to his employer. See Pet. App. 8a. But as other sections of both the First and Second Restatements make clear, "one may be an agent for another although he violates his fiduciary duty to the other in acting as such." Restatement (First and Second) § 23 cmt. a; see also *id.* (emphasis supplied) ("One whose interests are adverse to those of another may be authorized to act on behalf of the other; it is a *breach of duty* for him to so act without revealing the existence and extent of such adverse interests."); Restatement (First and Second) § 226 cmt. a.

An example from a recent decision of this Court illustrates the distinction between employee *status* and employee *breach of duty*: In *McKennon*, *supra*, the employee, a confidential secretary, took confidential documents from the company, showed them to her husband, and kept them for her own purposes, which were adverse

to those of the company. 115 S. Ct. at 883. This conduct certainly constituted a breach of an employee's common law duty of loyalty to the employer, and this Court assumed that the "misconduct . . . was so grave that McKennon's immediate discharge would have followed" on its discovery. *Id.* After that breach, however, Ms. McKennon remained an "employee" for all purposes, including for purposes of the ADEA, during the period she continued to be actually employed. In other words, had Ms. McKennon during that period organized a union and been fired for that reason, an argument by the employer that Ms. McKennon was not an employee covered by the NLRA because of her breach of the duty of loyalty in taking the documents would have fared no better than the employer's similar defense to an ADEA discrimination cause of action fared on the actual facts before the Court in *McKennon*.

The Eighth Circuit's second error with regard to the common law was that court's notion that the "servant of two master" section of the Restatement itself recognizes that a conflict of interest precludes dual employment.

The court of appeals' discussion of this point begins with an erroneous paraphrase of the comments to the "servant of two masters" section so as to suggest that the presence of some "conflict" between the service to one and the service to another eliminates the employment relationship. Pet. App. 8a. The section, however, actually speaks *only* of "abandonment," not of "conflict." Restatement § 226, *supra*. The difference is a critical one.

Hansen, for example, can *not* be said to have *abandoned* his service to Town & Country between the time he was hired and the date of his discharge. To the contrary, he reported to work daily and, the ALJ found, performed his assigned tasks properly. Compare, e.g., C.J.S. Employer-Employee Relationship § 51 (1992) (Abandonment of Employment by Employee) (abandonment co-

terminous with "refusal to serve," referring to, e.g., retirement or absence from work for unreasonable period).²¹

To be sure, the common law of the employment relationship incorporates, as a limitation on *respondent superior* liability, the concept that such liability ceases when the employee leaves the "scope of employment." And, the "scope of employment" concept might be said to be at least tenuously related to the "abandonment of service" limitation in Restatement § 226.²² But employee-union organizers such as Hansen have in no sense left their scope of employment because of their relationship with the union.

The Restatements make clear that "[c]onduct may be within the scope of employment although done in part to serve the purposes of . . . a third person". Restatement (First and Second) § 236. Specifically, where "the servant, although performing his employer's work, is at the same time accomplishing [the] . . . objects . . . of a third person which conflict with those of the master", the conduct is still within the scope of employment. *Id.*, cmt. a.

Here, there is no doubt that Hansen, for example, was "performing [Town & Country's] work" while employed by the company, even if part of his motive in so doing was to get to help organize his fellow employees for the union. The proposition that "ordinarily the control which

²¹ The Restatements do not define the term "abandonment."

²² See, e.g., *Higgins v. Western Union Tel. Co.*, 50 N.E. 500, 502 (N.Y. 1898) ("Beyond the scope of his employment the servant is as much a stranger to his master as any third person . . . [I]f the servant steps aside from his master's business, for however short a time, to do an act not connected with such business, the relation of master and servant is for the time suspended and an act of the servant during such interval is not to be attributed to the master."); see also *Holder v. Haynes*, 7 S.E.2d 833 (S.C. 1940); *Rogers v. Town of Black Mountain*, 29 S.E.2d 203 (N.C. 1944); *Master Auto Service Corp. v. Bowden*, 19 S.E.2d 679 (Va. 1942) (same).

a master can properly exercise over the conduct of the servant would prevent simultaneous service for two independent persons" (Restatement (First and Second) § 226 cmt. a (emphasis supplied)), is, as its language suggests, a qualified one.²³ And, here, the union had no interest, in controlling in any way Hansen's conduct with regard to the performance of electrical work during working time. Rather, the union's interest was, as the Board noted, that Hansen perform that work to the employer's complete satisfaction, so that Hansen could stay on the job and continue the organizing activity. (Pet. App. 37a). Thus, except for the critical fact that, as discussed below, there is, in fact, *no* cognizable conflict between the union's organizing interests and the employer's interest, the present situation is precisely the one described in Restatement § 236.

Third, and finally, the Eighth Circuit's common law discussion assumes a conflict of interest between the union and the employer, but does not specify what that conflict is. Insofar as the assumption is that there is a conflict between the union and the employer as to the performance of actual tasks by a union member working for the employer and organizing for the union, we have shown that that is simply not the case: The union is in no way asserting the authority to divert the employee from full performance of his or her obligations as an employee doing work for the employer while employed. Indeed, if the employee does default with regard to those obligations, she can be discharged without violating the NLRA.

Consequently, the Eighth Circuit's unarticulated premise must be that employee union organizing is, without more, "act[ivity] on behalf of a person or entity whose

²³ The Eighth Circuit paraphrased this sentence as the last part of its discussion of the common law (Pet. App. 8a), but took no notice of the fact that the present situation is not the "ordinary" one, for the reasons discussed in the text.

interests conflict with those of the principal in matters in which the agent is employed." Pet. App. 8a. But that premise is in no way limited in its application to individuals who are *paid* by the union for their organizing activity or who undertake employment with an employer with an intention from the outset to organize.

Thus, if the Eighth Circuit were right that employers are entitled to regard employee union organizing activity as a breach of the duty of loyalty to the employer, non-union employers could decline to hire or, in the alternative, could discharge *any* employee, who engages in organizing activity on behalf of a union while employed. That turns the NLRA upside down: Far from comprising an actionable breach of a duty of loyalty to an employer, such employee union organizing activity is, of course, affirmatively protected from employer interference, including interference through discharge or refusal to hire.

The NLRA's findings and declaration of policy make this plain.²⁴ Section 7 of the Act declares "the right to self-organization, to form, join, or assist labor organizations". Section 8(a)(1), in turn, declares it an unfair labor practice to interfere with that right. And, § 8(a)(3) has been understood from the earliest days of the Act to forbid employers to refuse to hire employees because of fears that, if hired, they might undertake to organize on behalf of a union.²⁵ *Republic Aviation, supra*,

²⁴ "The denial by some employers of the right of employees to organize" is one of the causes of the labor unrest the NLRA seeks to correct; "[e]xperience has proved that protection by law of the right of employees to organize . . . promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest"; "[i]t is hereby declared the policy of the United States . . . [to] protect[] the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing." NLRA § 1, 29 U.S.C. § 151.

²⁵ For example, in *NLRB v. Waumbec Mills*, 114 F.2d 226 (1st Cir. 1940), an employer denied employment to two former union

and its progeny, as we have seen, therefore affirmatively protect the right of employee-union organizers to approach fellow employees at appropriate times and places to solicit union membership. See, e.g., *Central Hardware Co. v. NLRB*, 407 U.S. 539, 542-43 (1972); *Beth Israel Hospital v. NLRB, supra*, 437 U.S. at 491 (1978).²⁶ Put another way, while the NLRA incorporates the common law's general definition of "employee", it does not incorporate, but instead *expressly overrides*, any concept that an employee's union organizing activity can be regarded as a breach of a duty of loyalty to the employer and therefore a basis for discharge or refusal to hire.

officers, one of whom was still an officer of an organization affiliated with the union, because "'we don't want no union and we don't want no trouble.'" 114 F.2d at 230. The First Circuit upheld the Board's finding that employment cannot, under the Act, be denied because the applicants for employment "had previously been union leaders and had taken an outstanding part in concerted activities for mutual aid and protection." *Id.* at 231. (*Waumbec Mills* was described in *Phelps Dodge, supra*, as an "able opinion" (313 U.S. at 186 n.5), and that opinion's reasoning was closely followed in *Phelps Dodge*.) Obviously, the employer's implicit contention in *Waumbec Mills* was that the applicants in question might undertake, if hired, to organize on behalf of the union, and that that concern should be a valid basis for denying them employment; it is that contention that was rejected. See also, e.g., *NLRB v. Botany Worsted Mills*, 106 F.2d 263 (3d Cir. 1939) (discharge of an employee because he solicited for the union during work time a violation of then-§ 8(3), where other forms of solicitation during work time were tolerated); *Phelps Dodge*, 313 U.S. at 193 (Act must be construed so that "men . . . leading efforts at organization" can be reinstated even if they had obtained equivalent wages elsewhere, in order to "encourag[e] the right of self-organization.")

²⁶ See also, e.g., *Abbey's Transp. Services Inc. v. NLRB*, 837 F.2d 575, 581 (2d Cir. 1988) (employer could not consider organizing efforts to be evidence of "disloyalty"); *Texaco, Inc. v. NLRB*, 462 F.2d 812, 814 (3d Cir.), *cert. denied*, 409 U.S. 1008 (1972) (same).

In short, as the Board observed in its decision in this case, "[n]o coherent policy considerations" have been advanced on the employers behalf "that do not, on analysis, resolve themselves into arguments that employers be permitted to discriminate based on an individual's presumed or avowed intention to join or assist a labor organization." Pet. App. 33a-34a.

II. SECTION 2(3) OF THE NLRA AS PROPERLY CONSTRUED BY THE NLRB IN THIS CASE DOES NOT IMPAIR ANY LEGITIMATE EMPLOYER INTEREST.

The arguments by the employers in this case and others like it have devoted scant attention to the determinative considerations discussed above—the actual language and structure of § 2(3), read against that section's legislative history and the common law which that history directs the Board and the courts to apply, and against the NLRA's core protection of § 7 organizational activity.

Those arguments instead have been cast in terms of "fairness" and "sound policy." Treating individuals who are working at a construction job or who are ready, willing and able to do the work and are applying for such a job *and* who have a purpose to engage in lawful union organizing activities, or have agreed with a union to engage in such activity, or are being paid by a union to engage in such activity, as part of the same class as other individuals doing such work or making such applications—*viz.*, as members of the NLRA § 2(3) class of "employees"—is, it is claimed, both unfair to employers and bad labor policy.

1. Before considering this line of argument in its own terms, two preliminary points are, we believe, critical.

The first is the obvious point that ultimately the statutory materials must be controlling, whatever view one takes of the wisdom of the Congressional choice. Even

if "the tactics used here deserve condemnation" (which, for reasons we recount below, they do not) "this would not justify attempting to pour that condemnation into a vessel not designed to hold it." *NLRB v. Insurance Agents International Union*, 361 U.S. 477, 496 (1960); *see also id.* at 500.

The definition of "employee" in NLRA § 2(3), as we have shown, was not designed to and simply will not bear the construction the Eighth Circuit placed upon it. Nothing in that definition calls for the scope of the term "employee" to be determined according to whether it is in some subjective sense "appropriate" or "fair" for a particular subclass of individuals to be a part of the workforce. The category of "employee" simply applies to all those who in fact *are* in the workforce. *See* pp. 23-31, *supra*. This means that one may certainly be an "employee" despite the fact that one continues in the job for secondary, personal motives, despite the fact that one has the undisclosed intent to leave shortly, and despite the fact that one takes the job at the request of another. While these factors may well make a worker far less than an ideal "employee" (from an employer's perspective), and while these factors may well motivate—and in some instances justify—an employer's decision not to hire or retain the "employee," they do not deny the individual the status of an "employee." *Cf. Budd Mfg. Co. v. NLRB*, 138 F.2d 86, 90 (3d Cir. 1943), *cert. denied*, 321 U.S. 778 (1944) (treating hired worker as "employee" under the Act despite the fact that he did not perform his job functions, disrupted the work of others, ignored company rules, and "[i]f ever a workman deserved summary discharge it was he").²⁷

²⁷ In *Sure-Tan*, *supra*, for example, this Court affirmed the Board's inclusion of undocumented aliens within the category of "employees" despite the illegality of their very presence in the country. Although such individuals might well be considered "inappropriate" for inclusion within an employer's hired workforce, the Court had no difficulty holding that illegal aliens actually

Second, under the NLRA, employers can set their own employment conditions, as the employer sees fit, subject to only two limitations—that the employer not discriminate against union members and union activists *qua* member or activist and not take actions that interfere with the exercise of § 7 rights. Subject to those limitations, today as in 1934, employers can as far as the NLRA is concerned follow such employment policies governing hiring qualifications and the conditions of continued employment as the employer believes further its interests.

In particular, to the degree that an employer is concerned with assuring a particular tenure of employment, the NLRA definition of “employee” in no way governs or precludes the employer’s negotiation, as a neutral condition of employment applicable to union members and nonmembers alike, of a promise to stay in his employ for a specified time period. Absent such an agreement, however, it is also true that nothing in the NLRA overrides the usual employment law rule “that contracts of employment which mention no period of duration . . . are terminable at the will of either party.” 53 Am. Jur. 2d Master & Servant § 27; *see also, e.g.*, 30 C.J.S. Employer-Employee Relationship § 39 (“an employment for an indefinite term may be terminated at the will of either party, regardless of the length of service, for or without cause, and without giving any reason or explanation”).

This principle of mutual at-will employment relationships does not draw distinction as to *why* an employee

working for an employer “plainly come within the broad statutory definition of ‘employee.’” 467 U.S. at 892. The Court emphasized that, despite its holding regarding “employee” status, an employer remains free to refuse to hire undocumented aliens or to discharge or report them to the authorities because of their undocumented status, as long as the employer does not act from those anti-union motives prohibited by the substantive provisions of the NLRA. *Id.* at 895.

chooses to leave employment at a given time, whether pursuant to a prior plan that existed at the time the employment began or in accord with an agreement with a third party. Thus, to the extent that an employer is concerned that the law allows employees to harbour unrevealed commitments that may cause them to leave sooner than the employer might desire, the employer’s complaint is with the common law and with his own failure to provide a contract of employment sufficient to override the presumption of at will employment, not with the NLRA.

Indeed, nothing in the present context is at all unusual. Many employees have, at the time they take a position, plans for their own lives or obligations to third parties, not known to the employer, that will preclude indefinite employment. For example, an employee may be on layoff from another job, with a commitment to the former employer to return to the old job when a position becomes available (and, often, with inducements offered such as preservation of benefit credits or re-entry at the employee’s prior seniority status). Or an employee may have accepted an offer of admittance to an academic institution for the following term, and put down a deposit which will be lost if she does not attend. Other examples would include a commitment to a spouse to move if the spouse is offered a position elsewhere which offers financial advantages to the couple, or a commitment to one’s family to resign from one’s job if asked to do so in order to take over the family business.

The understanding of the law is that, absent an agreement to the contrary, the employer properly has the burden in any of these cases of hiring another employee should the unknown contingency actually arise and the present employee leave the job.²⁸

²⁸ If a durational requirement were set by the employer and accepted by the employee, the individual hired would be a *temporary* employee, but would still be an “employee” for NLRA purposes. *See Pennsylvania Electric Co.*, 289 NLRB 1260 (1988); *EDP*

What is at stake here, then, is not whether employers are to be allowed to run their workplaces in accord with neutral rules designed to assure productivity and discipline, but whether employers are to be allowed to discriminate on the basis of union membership and to interfere with § 7 activity with regard to certain individuals who on every count are NLRA § 2(3) employees.

2. With that lengthy preliminary we now return to the employers' arguments in this species of case that it would be unfair and contrary to sound policy to include individuals with certain kinds of relationships with a union in the § 2(3) "employee" class and meet those arguments on their own terms.

First, there is the contention that it is unfair to require an employer to hire or retain an individual who undertakes work for an employer with the purpose of organizing on behalf of a union. Under the NLRA, however, an employer is not free to define a required duty of "loyalty" and "commitment" that precludes union commitments consistent with the performance of the employee's job duties. See pp. 44-45, *supra*; see also, e.g., *Peyton Packing Co.*, 49 NLRB 828 (1943).

Medical Computer Systems, 284 NLRB 1232 (1987); see also *Sunland Const. Co.*, 309 NLRB at 1229 n.3.

We note that it not surprising that the employer in this case, as a construction industry employer, did not impose any durational requirement as a condition of employment. Construction industry employment is usually on a job-by-job transitory basis in any event, and the job at Boise Cascade could have lasted as little as three months. Pet. App. 50a. There is absolutely no basis for believing that any union organizing campaign would have lasted less than three months, or that Hansen would not have agreed in good faith to a three-month durational requirement had he been asked. And, of course, had the organizational campaign succeeded, the union rule against employment with a nonunion employer would have ceased to apply, and Hansen would have had no union-related reason to leave. In short, given the transience of employment in the construction industry, the notion that an employer in that industry has an overriding interest in assuring long-term job tenure belies reality.

Nor, does the employer have a just complaint if the individual is acting under a union rule that limits working non-union to members who commit to active organizing. Unions are entitled, under the NLRA, to advance legitimate union interests by promulgating internal rules applicable to all union members. *NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175 (1967); *Scofield v. NLRB*, 394 U.S. 423 (1969). The union interests advanced through such means are not always congruent with employer interests. Indeed, those lawful rules in some instances impose the obligation to leave work—that is, to strike. *Allis-Chalmers, supra*. Plainly a union rule prohibiting non-union sub-standard work advances a legitimate union interest. Cf., *Florida P.&L. v. Electrical Workers*, 417 U.S. 790, 793, 805 n. 16 (1974). And, that is true of the more nuanced rule at issue in this kind of case. Both rules are thus within the protection of the proviso to § 8 (b)(1)(A) of the Act, 29 U.S.C. § 158(b)(1)(A). It follows that such rules can not be said to be contrary to sound labor policy.²⁹

Second, the employers contend that any cash nexus between an employer/union organizer and the union is illegitimate and that this illegitimacy divests the individual of § 2(3) "employee" status. But the Board has long held, for example, that union stewards who perform workplace union functions—many of whom are paid by the union or receive rebates on dues³⁰—are "employees" engaged in

²⁹ In this regard, it is also to the point that under the NLRA, employees have the right to *negate* such union rules by resigning union membership. *Pattern Makers' League of North America v. NLRB*, 473 U.S. 95 (1985). The union members who made up the bulk of the discriminatees in this case could, under *Pattern Makers*, have resigned from the union once employed should they prefer to continue working for the nonunion employer without being subject to the obligation to organize while they are doing so.

³⁰ While some union adherents have the time, commitment, and freedom from other responsibilities to undertake extensive union responsibilities without recompense, unions often provide some

fully protected concerted activities protected against employer interference. *See General Motors Corp.*, 218 NLRB 472 (1977). And, the Labor Management Relations Act and Landrum Griffin Act affirmatively recognize that unions may pay employees for union service when those employees are also working for, and being paid by, an employer covered by the Act. LMRA § 302(c)(1), 29 U.S.C. § 302(c)(1) (prohibition on employer payments to officers and employees of labor organizations does not apply to any such "officer or employee of a labor organization who is also an employee or former employee of such employer"); 29 U.S.C. § 432(a)(5) (requiring that officers and employees of labor organizations report any financial transaction with an "employer whose employees his organization represents or is actively seeking to represent except work performed and payments and benefits received as a bona fide employee of such employer").³¹

Indeed, there is no legally relevant difference between union members who advance union interests on the job in part because induced to do so by union payments, and union members who advance union interests on the job in part because induced to do so by union rules (enforceable, e.g., by fines) valid under the *Allis-Chalmers* line of cases discussed above. In both cases, the right of employees as a group through their unions to create such inducements is legitimate under the NLRA, and in both cases the individual affected can avoid the inducements and the obligations that go with it should he or she choose

compensation for work undertaken on their behalf by union officers whose primary employment is at the plant or other work location where represented employees work. *See generally* Sayles & Strauss, *The Local Union* 67 (1967); Peck, *The Rank & File Leader* 32-34, 58-62 (1963); Bureau of Labor Statistics, *Major Collective Bargaining Agreements: Employer Leave & Pay for Union Business* 4, 29 (1980).

³¹ The latter provision's wording makes clear that Congress sees no distinction between employer payments to employees of unions not yet designated as the exclusive representative and such employer payments after a union has been so designated.

to do so, by resigning membership or resigning any paid union position.

In this the labor law recognizes that it is no less true for unions than for other nonprofit organizations that providing recompense to those who communicate with potential members and contributors can well be essential to successful communication. As this Court has repeatedly ruled, regulation of, and even disclosure concerning, the payments made to fundraisers for charity substantially inhibit charities in communicating with their potential donors, and therefore are inherently suspect. *Riley v. National Federation of the Blind*, 487 U.S. 781, 788-79 (1980); *see also* *Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620, 629 (1980). And, as the Court added in *United States v. National Treasury Employees Union*, 63 U.S.L.W. 4133, 4132-38 (February 21, 1995), "publishers compensate authors because compensation provides a significant incentive toward more expression."

Third, and finally, the employers argue that it is improper to treat paid union officials as § 2(3) employees. But it has been clear since the earliest days of the Act that employers may not impose special disqualifications on union officials, such as refusing to hire them although they are prepared to fulfill the duties of any employee. *Waumbeec, supra*; *Metropolitan Edison Corp. v. NLRB*, 460 U.S. 693, 703 (1983) ("holding union office clearly falls within the activities protected by § 7 . . . and there can be little doubt that an employer's . . . imposition of discipline on union officials inhibit qualified employees from holding office"). Of course, like union members generally, union officials can resign and refuse further union payments if they would prefer not to advance the union's interests any longer.

In sum, more of the employers' attempts to override § 2(3)'s plain meaning on "fairness" or policy grounds provides a reasoned—much less a legitimate—basis for so doing.

CONCLUSION

For the reasons stated above, the Court should reverse the judgment below.

Respectfully submitted,

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APPENDIX

New Business—Mike Priam resended a new salting resolution. Motion was made, seconded and passed as follows:

SALTING RESOLUTION

WHEREAS: IBEW Local 292 is committed to organizing all unorganized craftsman working in our jurisdiction, and;

WHEREAS: a continual organizing program is the lifeblood of all building and construction trades unions because it is the only proven method of maintaining control of the construction labor pool and;

WHEREAS: a principal obligation of the members of the local union is to organize the unorganized in order to maintain and secure our wages, benefits and other conditions of employment and;

WHEREAS: the success of any organizing drive depends upon the support of each and every union craftsman, both on and off the job; Therefore be it

RESOLVED: that unemployed members shall report to the Business Manager for the purpose of assisting as needed in the organizing program, and be it further

RESOLVED: that the Business Manager be empowered to authorize members to seek employment by nonsignatory contractors if they are willing, in addition to the performance of work assigned by their employer, and as set forth below, to assist in the local union's organizing program, and be it further

RESOLVED: that the Business Manager shall maintain records of all members authorized to seek employment by nonsignatory employers including dates of authorization, dates of employment and all other pertinent information and be it further;

RESOLVED: that such members, when employed by non-signatory employers, shall promptly and diligently carry out the electrical construction work assigned to them by their employer for the duration of the project, and shall engage in organizing their fellow employees only on non-work time, and/or in non-work areas and in accordance with any lawfully promulgated distribution and solicitation rules and be it further

RESOLVED: that such members, when employed by nonsignatory employers, shall be compensated by the local union only for the time spent organizing before or after working hours of the nonsignatory employer.

RESOLVED: That any member accepting employment by a nonsignatory employer, except as authorized by this **RESOLUTION**, shall be subject to charges and discipline as provided by our constitution and bylaws.

Adopted by Local Union IBEW 292 membership this 11th day of October 1994.

NO. 94-947

FILED
APR 19 1995

OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1994

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

TOWN & COUNTRY ELECTRIC, INC. AND
AMERISTAFF PERSONNEL CONTRACTORS, LTD.,
Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF FOR RESPONDENT TOWN & COUNTRY
ELECTRIC, INC.

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BEST AVAILABLE COPY

QUESTION PRESENTED

Whether a paid union organizer who is committed by a union's "salting" resolution to work for the union in furtherance of its organizing drive against a nonunion employer and who works for, or seeks to work for, the targeted nonunion employer, is a bona fide "employee," of the targeted nonunion employer within the meaning of § 2(3) of the National Labor Relations Act (29 U.S.C. 152(3)).

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STATEMENT OF THE CASE

Town & Country Electric, Inc. (hereinafter "TCE"), a large nonunion electrical contractor located in Appleton, Wisconsin, has a history of hiring workers affiliated with the International Brotherhood of Electrical Workers (hereinafter "IBEW"), even though that Union has targeted TCE for unionization. J.A. 100; Tr. 298-299.¹ Approximately forty percent of TCE's workforce is made up of union-affiliated employees. J.A. 116. This is consistent with TCE's progressive management philosophy which is described in the record. J.A. 261-264.

In early September, 1989, TCE obtained a contract from Boise Cascade to perform supplemental maintenance work, on an as-needed basis, at Boise Cascade's existing International Falls, Minnesota facility. TCE, which had not previously worked in Minnesota, learned, shortly before the work was to begin, that it needed one Minnesota-licensed electrician for every two unlicensed electricians working at the Boise Cascade facility. Pet. App. 2a. Since none of its regular crew had Minnesota licenses, and it would take some time for them to become licensed, TCE needed Minnesota-licensed journeymen electricians to supplement its crew in order to perform the work initially assigned to it by Boise Cascade.

¹ The following abbreviations are used: Joint Appendix, "J.A."; Appendix submitted with Petition for Certiorari, "Pet. App."; Petition for Certiorari, "Pet."; and Transcript, "Tr."

TCE contacted Ameristaff, an independent temporary help agency, and asked them to find the needed Minnesota-licensed electricians. Ameristaff scheduled seven interviews with job applicants at the Embassy Suites Motel in Minneapolis, Minnesota.² Pet. App. 3a.

When the interviewers arrived at the Embassy Suites approximately two hours late due to a flight delay, some unidentified people were waiting for them.³ The interviewers didn't know that only one of the people waiting had a scheduled appointment. Pet. App. 3a.

The interviewers offered a job to the second person they interviewed. Pet. App. 3a. After the second interview, Steve Buelow of Ameristaff reported that the remaining applicants, who had filled out applications in the adjoining room, were not scheduled for interviews. Buelow also indicated to the interviewers that the uninvited applicants appeared to be from the Union. Pet. App. 3a. Ron Sager, TCE's manager of human resources, decided, because they were already two hours behind schedule due to a flight delay and because he was responsible for conducting the company-wide manpower meeting in

² Ameristaff, on its own initiative, asked applicants if they were willing to work on a nonunion job, because of an experience its president, Steve Buelow, had with a union electrician who Buelow had tried to place, but who was unwilling to work, on a local nonunion job because of fear of union discipline. Applicant responses, if any, were not communicated to TCE. J.A. 86-90.

³ Not all the salted organizers were present when the interviewers arrived. The salted organizers kept arriving throughout the interview process. J.A. 11.

Appleton that afternoon, [J.A. 101; Pet. App. 3a; Tr. 305-306], to interview only those applicants with appointments.⁴ J.A. 101-102. When told of TCE's decision, the uninvited applicants became loud and unruly.⁵ After quieting the crowd, TCE was able to confirm that only one of the applicants present had made an appointment and, accordingly, he was interviewed. That person, Malcolm Hansen, told the interviewers that he was a member of the IBEW. Nonetheless, he was hired for the Boise Cascade work. Pet. App. 4a.⁶

⁴ By that time the interviewers had already made one offer of employment to an applicant who was interested, but wanted more money. The ALJ also found that Buelow of Ameristaff intended to verify the employment references of the uninvited applicants when he returned to Appleton. Pet. App. 57a.

⁵ Buelow was correct in his belief that the remaining people were from the Union. Hansen and the uninvited applicants all were present at the behest of the Union pursuant to the Union's "salting resolution." J.A. 256-257.

⁶ The ALJ dismissed all independent 8(a)(1) allegations relating to the interviews at the Embassy Suites, essentially discrediting the General Counsel's witnesses. The ALJ did find that the failure to interview the unscheduled applicants was unlawful, but that finding was based on the ALJ's presumption that all nonunion employers will discriminate against someone they believe is affiliated with a union which may be interested in organizing them. The ALJ expressly admitted that he was applying that presumption. Pet. App. 62a-63a, 108a.

At the outset of his discussion of TCE's defense, the ALJ described at great length his presumption of the unlawful motivation of all nonunion employers, which was not based on anything representatives of TCE had said or done. The ALJ based his credi-

(continued...)

At Boise Cascade, Hansen, who was on Ameristaff's payroll, engaged in unionization activity when he was supposed to be working, despite being told that he was required to work during working time.⁷ TCE's employees rebuffed Hansen's efforts and complained to their supervisor that Hansen was interfering with their work. J.A. 126-127, 145, 151-152, 166. But, Hansen persisted in his unionizing efforts. When TCE learned it would have to transfer Hansen to its payroll in order to count him towards the licensed electrician ratio requirements, TCE decided not to do so because Hansen spent so much of his time violating TCE's no solicitation rule,⁸ and because, when Hansen did work, he abused

⁶(...continued)

bility findings and his rejection of TCE's defenses on that presumption. The ALJ repeatedly stated that he rejected the testimony of TCE's witnesses because, e.g., that testimony was "out of comport with economic realities," (Pet. App. 108a), or was otherwise inconsistent with the ALJ's presumption that nonunion employers are unlawfully motivated. Pet. App. 65a; 77a, fn.34; 108a; 43a, fn.1. The ALJ's presumption of unlawful intent, which was upheld by the NLRB, was also used as the basis for rejecting TCE's arguments which were inconsistent with the presumption. Pet. App. 64a-65a. Those applications of the presumption made it irrebuttable. The Eighth Circuit found it unnecessary to rule on TCE's argument that the NLRB's presumption of unlawful motive was inappropriate. Pet. App. 11a.

⁷The ALJ credited Sager's testimony (J.A. 105, 109-110) that he advised Hansen of TCE's no solicitation rule. (Pet. App. 929-949; 1099-1109 fn.73)

⁸ The ALJ and the Board, relying on credibility resolutions based on the presumption of TCE's unlawful motive, described in
(continued...)

TCE's tools and equipment and performed poor quality work.⁹ After being released by Ameristaff, Hansen drove directly to the Union's office in Minneapolis to prepare charges for filing with the National Labor Relations Board ("NLRB" hereinafter).¹⁰ J.A. 72.

The Union paid Hansen One Thousand Ninety-One and 82/100 Dollars (\$1,091.82) for his three days' work for the Union at Boise Cascade. J.A. 259. That pay was in addition to, and substantially greater than, the Seven Hundred Twenty-Five and 15/100 Dollars (\$725.15) he received from Ameristaff for that same period of time. J.A. 201. The Union's business manager testified that, pursuant to the Union's salting resolution, all salts were to be paid on the same basis. J.A. 24-25.

The Union filed charges against TCE and Ameristaff, and the NLRB issued a complaint. TCE

⁸(...continued)

footnote 6 herein, found that TCE's application of its no solicitation rule was unlawful.

⁹ Contrary to the Board's assertions on page 34 of its Brief, there was extensive testimony regarding the abuse of tools and equipment by Hansen and the poor quality of his work. J.A. 127-128, 144-149, 151-156, 158-159. The only reason Hansen received a raise was that he demanded it at a time when TCE was dependent on his license to keep its crew working on the job. Pet. App. 84a-85a.

¹⁰ The Eighth Circuit was justified in observing that Hansen returned to his full-time Union job after he was let go by Ameristaff. The Union's records show that Hansen was employed by a Union contractor before, after and during the time he was ostensibly working on TCE's crew. J.A. 281.

denied that it had committed any unfair labor practices. Pet. App. 43a.

The ALJ, with NLRB approval, largely discredited the testimony of four TCE employees regarding Hansen's poor work performance, essentially based on Hansen's denial, even though the ALJ had discredited Hansen elsewhere and had caught him lying in his explanation of his work performance.¹¹ Pet. App. 110a-121a.

The ALJ and the NLRB also found that TCE discriminatorily refused to interview the uninvited, unscheduled, unscreened and unruly applicants.¹² And,

¹¹ The ALJ frequently found the General Counsel's principal witnesses, Hansen and Priem, unreliable. Pet. App. 54a, fn.15; 72a-74a; 86a, fn.44; 109a, fn.73. Indeed, the ALJ caught Hansen lying when Hansen supported his denial that he had ruined TCE's drill bits by claiming that he always carried a unibit with him. Hansen claimed that he had the unibit drill bit in his pocket all day during the hearing, but the ALJ's inspection revealed the metal bit was still cold, apparently from having recently been brought into the hearing room after recently being outside in the December cold, characteristic of Minneapolis. J.A. 180-181. Essentially, the only basis for the ALJ's partial crediting of Hansen was the ALJ's presumption of TCE's unlawful motivation.

¹² The ALJ acknowledged that TCE had a valid business defense for not hiring all the discriminatees. TCE only needed enough Minnesota-licensed electricians to get started on the Boise Cascade project. There is evidence in the record that two Minnesota-licensed electricians would have satisfied that need. The following week, TCE learned it could not use Ameristaff electricians to satisfy the Minnesota license requirement. All the applications were taken by Ameristaff. Because of the substantial fee it would have to pay Ameristaff for
(continued...)

they found that TCE's failure to put Hansen on its payroll was discriminatorily motivated. Pet. App. 121a, 14a. The ALJ and the NLRB further found that representatives of TCE had made several unlawful statements at the International Falls project, again, based primarily on the ALJ's presumption of TCE's discriminatory motivation. Pet. App. 13a-14a, 109a-110a.

The NLRB held that all the alleged discriminatees were "employees" of TCE within the meaning of the National Labor Relations Act, as amended (hereinafter the "NLRA"), because they were employees within the meaning of the law of agency, and that interpretation of the law of agency did not thwart congressional intent or produce absurd results.

TCE challenged all NLRB findings of unlawful conduct before the Eighth Circuit Court of Appeals. That Court decided that the NLRB had incorrectly interpreted the law of agency, and that none of the people who were the object of the alleged unfair labor practices was a bona fide employee of TCE within the meaning of the NLRA. Pet. App. 9a. Therefore, no violation of the NLRA occurred. The Eighth Circuit found it unnecessary to decide whether the NLRB improperly approved the ALJ's

¹²(...continued)

using people who had applied to Ameristaff, TCE would not have used those applications and would have independently solicited applicants. The ALJ stated that the evidence supporting that defense was "beyond suspicion." Pet. App. 57a. The ALJ left to the compliance proceeding how many alleged discriminatees were entitled to monetary redress. Pet. App. 58a-59a.

use of an irrebuttable presumption that all nonunion employers are unlawfully motivated to discriminate against individuals who are affiliated with a union, or whether the NLRB failed to follow the precedent that permits employers to prohibit solicitation during work time. Pet. App. 10a-11a. The Eighth Circuit denied enforcement of the NLRB's order. Pet. App. 11a.

SUMMARY OF ARGUMENT

TCE allegedly violated the NLRA by conduct involving salted organizers. The NLRA only protects "employees." Thus, the allegations against TCE can only be pursued if the salted organizers are "employees" within the meaning of the NLRA.

In defining "employee" in § 2(3) of the NLRA, Congress used a circular definition which incorporated the common law of agency. The common law of agency provides that a person simultaneously may not be the agent of two masters who have conflicting interests.

The salted organizers had entered into an agreement with the Union which subjected them to Union control during the time they ostensibly were working for TCE. The salting resolution required that their sole purpose in working for TCE be to act in furtherance of the Union's organizing campaign, thereby prohibiting them from working in furtherance of TCE's interests while on TCE's payroll. The only way salted organizers could work in furtherance of TCE's interests was to resign from the Union, i.e., abandon their relationship with the Union. The Union's control over the salted organizers for a

purpose which conflicted with the interests of TCE, while they ostensibly would be working for TCE, prevented the salted organizers from being able to enter into an employment relationship with TCE in which they would be subject to TCE's control. Therefore, the salted organizers were not, and could not be, bona fide "employees" of TCE within the meaning of the NLRA.

ARGUMENT

A. The NLRA Only Protects Bona Fide Employees.

Section 7 of the NLRA protects the freedom of "employees" to engage, or to refrain from engaging, in concerted activity protected by the NLRA. The limited scope of § 7 was affirmed in Lechmere, Inc. v. NLRB, 502 U.S. 527 (1992), where this Court held that the NLRB had too broadly defined the protection afforded by the NLRA when it extended that protection to union organizers who were not "employees" within the meaning of the NLRA. This Court stated:

By its plain terms, thus, the NLRA confers rights only on employees, not on unions or their nonemployee organizers.

....

While no restriction may be placed on the employees' right to discuss self organization among themselves, . . . no such obligation is owed nonemployee organizers. As a rule, then, an employer

cannot be compelled to allow distribution of union literature by nonemployee organizers on his property.

Lechmere, supra at pp. 532-533.

This Court has recognized that when Congress uses a circular definition of "employee," it intends to incorporate the traditional agency law meaning of "employee" into that definition. *Nationwide Mutual Insurance Company v. Darden*, 503 U.S. ___, 117 L. Ed. 2d 581, 588-591 (1992); *see also, Chemical Workers v. Pittsburgh Plate Glass Company*, 404 U.S. 157, 166 (1971) ("The term 'employee' is not to be stretched beyond its plain meaning . . ."); and *IUOE Local 487 Health and Welfare Trust Fund (Heavy Construction Association of South Florida, Inc.)*, 308 N.L.R.B. 805, 805-806 (1992). The NLRB acknowledged in its decision herein, that the meaning of the term "employee" is provided by the law of agency.¹³ Pet. App. 27a-28a. Thus, in order to become an employee of an employer, a person must become an "agent" of that employer, as that term is defined by the law of agency.

¹³ Though the NLRB argued at length in its Petition for a Writ of Certiorari that the NLRB's decision was consistent with the law of agency, the NLRB appears to have retreated from that position in its Brief.

B. The Law Of Agency Requires That An Agent Be Subject To The Control Of The Agent's Master.

An agency relationship only exists if the agent is free to act in furtherance of the employer's interests and to submit to the employer's control. As stated in *Restatement (Second) of Agency* § 1 cmt. a. (1958), ". . . the agent must act or agree to act on the [employer's] behalf and subject to [the employer's] control."

If a person is not free to act in furtherance of the employer's interests or is not subject to the employer's control, that person is not the agent of that employer. "The agency relation results if, but only if, there is an understanding between the parties which . . . creates a fiduciary relation in which the fiduciary is subject to the directions of the one on whose account he acts. It is the element of continuous subjection to the will of the [employer] which distinguishes the agent from other fiduciaries and the agency agreement from other agreements." *Restatement (Second) of Agency* § 1 cmt. b. (1958).

In addition, when determining whether a servant (employee) who has been lent by one master (employer) to another has become the servant of the borrowing master (employer), the issue is who has control. The presumption is that the servant remains in the employ of the original master, even if there has been some division of control. The servant only becomes an employee of the second employer when the original employer relinquishes control. *Restatement (Second) of Agency* § 227 (1958).

C. **A Person May Not Simultaneously Be The Agent Of Two Masters With Conflicting Interests.**

When the interests of two masters conflict, a person simultaneously cannot fulfill the obligation to serve both masters, since the control of the first master prevents the second master, with adverse interests, from exercising control over that person, and prevents that person from, in good faith, serving both masters. A person with conflicting masters must act in accordance with that person's obligations to the primary master even though that conduct is contrary to the interests of the secondary master. And, that person may not act on behalf of the secondary master in a manner which is contrary to that person's obligations to that person's primary master. In such a situation, a person may not be the agent of both masters. Restatement (Second) of Agency § 226 (1958) states:

A person may be the servant of two masters, not joint employers, at one time as to one act, if the service to one does not involve abandonment of the service to the other.

Comment a. explains:

Since one can perform two acts at the same time, it is possible for each act to be performed in the service of a different master, although ordinarily the control which a master can properly exercise over the

conduct of the servant would prevent simultaneous service for two independent persons. Likewise, a single act may be done to effect the purposes of two independent employers. Since, however, the relation of master and servant is dependent upon the right of the master to control the conduct of the servant in the performance of the service, giving service to two masters at the same time normally involves a breach of duty by the servant to one or both of them. . . . He may be the servant of two masters, not joint employers as to the same act, if the act is within the scope of his employment for both (*see* § 236); he cannot be a servant of two masters in doing an act as to which an intent to serve one necessarily excludes an intent to serve the other. . . . [emphasis added]

An employer has the right to expect its employee to be free to follow the employer's direction and to work in furtherance of the interests of the employer. This right of the employer to control the employee in the performance of the employee's duties for the employer¹⁴ is the

¹⁴ Not being subject to the control of an employer is different from being free to be subject to an employer's control but harboring different interests from that employer. In the latter case, that person is subject to the employer's control and is able to become an "employee" of that employer, though, because of that person's interests, that person may decide to breach its obligation to submit to
(continued...)

foundation upon which the above-quoted § 226 of the Restatement (Second) of Agency (1958) rests.¹⁵

¹⁴(...continued)

the employer's control. In the former case, the person has no choice and is barred by obligations to the first employer from agreeing to serve and to submit to the control of the second employer, i.e., that person cannot become an agent of the second employer and is not an "employee" of the second employer within the meaning of § 2(3) of the NLRA.

¹⁵ These principles of agency are generally accepted. For example, 53 Am. Jur. 2d, Master and Servant, § 97 (1970), pp. 170-171, supp. p. 70, provides:

The law implies an agreement on the part of the servant or employee to faithfully serve and be regardful of the interest of his employer during the term of his service, carefully discharge his duty to the extent reasonably required by the relation of employer and employee (citations omitted), and to treat his employer with respect. (citations omitted).

Williston on Contracts, § 1014C states:

The duty of fidelity to his employment imposes on the employee not simply the duty of reasonably skillful performance of the work entrusted to him, but the negative duty of refraining from deception and entering into relations giving him an interest inconsistent with that of the employer.

....

[T]he employee may neither enter into business relations in competition with his employer, even though the business is so conducted by agents or

(continued...)

Thus, a person who is bound to serve and submit to the control of a master cannot become a bona fide employee of another master who has conflicting interests, and therefore, is not an "employee," within the meaning of § 2(3) of the NLRA, of that other master.

D. The Alleged Discriminatees Were Not Employees Of TCE.

The salted organizers herein were subject to the Union's salting resolution which gave the Union exclusive control over the salted organizers while they ostensibly were working for TCE. The interests of the Union and TCE conflict. The Union's interest is to confront management at every opportunity and to create as much

¹⁵(...continued)

otherwise as not to deprive the employer of the employee's attention, nor seek to acquire an indirect advantage from third persons for performing his duty to his employer.

And, in Lamdin v. Broadway Surface Advertising Corporation, 272 N.Y. 133, 138, 5 N.E.2d 66, 67 (1936), in discussing "the standard required by the law of one acting as an agent or employee of another," the New York Court of Appeals stated:

It is an elementary principle that an agent cannot take upon himself incompatible duties, and characters, or act in a transaction where he has an adverse interest or employment. (citations omitted) In such a case he must necessarily be unfaithful to one or the other, as the duties which he owes to his respective principals are conflicting, and incapable of faithful performance by the same person. (citations omitted)

disharmony and controversy between TCE and its employees as possible to encourage employees to support the Union. TCE's interest is to have employees who diligently follow instructions, perform their work as effectively and efficiently as they can, work effectively with other employees and with people who have a business relationship with TCE, and who are free from control by a third party who doesn't have the same interests as TCE. The express purpose of the salted organizers' employment by the Union was to pursue the Union's interests. That purpose necessarily prohibited them from agreeing to serve or submit to the control of TCE. Therefore, the salted organizers could not have become bona fide agents of TCE within the meaning of the law of agency, and were not "employees," within the meaning of the NLRA with respect to TCE.

1. The alleged discriminatees herein were subject to the Union's control while working for the targeted nonunion contractor.

In this case, two of the salted organizers were full-time business representatives of the Union, and all of the organizers were governed by the Union's salting resolution. Pet. App. 8a-9a. Under the salting resolution, the salted organizers were only permitted to work for the nonsignatory employer if their sole purpose was furthering the Union's organizing effort. If a salted organizer accepted employment with a nonsignatory contractor for any other purpose, that salt would be in violation of the

salting resolution and would be subject to Union charges and discipline. J.A. 256-258.¹⁶

The salting resolution further provides that while working for the nonsignatory contractor, the salted organizers "shall promptly and diligently carry out their organizing assignments, and leave the employer or job immediately upon notification" by the Union. J.A. 256-258. Under the salting resolution, the Union has primary control over everything the salted organizers do during the course of their work day. The control of the Union over the salted organizer is pervasive and is paramount to that of the targeted nonunion contractor.¹⁷

The salted organizers herein were subject to the salting resolution and had lost their freedom to exercise any right under § 7 of the NLRA. The salting resolution, in effect, prohibits the salt from deciding that TCE is an excellent employer who has developed a program that is better for its employees than the Union's program; it

¹⁶ The relationship between the Union and its member is considered contractual in nature. See, e.g., NLRB v. Boeing Company, 412 U.S. 67, 75 (1973) and cases cited therein. Members who violate the contract are subject to court-enforceable fines and expulsion from the Union. NLRB v. International Brotherhood of Electrical Workers, Local 340, 481 U.S. 573, 576 (1987). Thus, any salted organizer who violated the "sole purpose" requirement of the salting resolution would be subject to court-enforceable fines.

¹⁷ Apparently, the Union changed its standard salting resolution sometime after the incidents involving TCE occurred, though it still provides for Union control of the salted organizer. Any such change is not a part of the record herein and is immaterial to this case.

prohibits the salt from concluding that the employees would be better off without the Union; it prohibits the salt from speaking in favor of TCE's personnel policies; and it prohibits the salt from voting against representation by the Union in an NLRB election. In short, it prevents the salt from exercising any of the rights protected by § 7 of the NLRA.

The extent to which the Union can control the salted organizers herein is suggested by a manual on organizing titled, A Troublemaker's Handbook: How to Fight Back Where You Work—And Win!, [A Labor Notes Book, Detroit, 1991], which states at page 9:

Organizing begins when people question authority . . . Organizing is about changing power relationships, changing the balance of forces between management and workers. Confrontation with the employer has to be built into the escalating activities.

Under this strategy, the organizing campaign permeates everything the organizer does while on TCE's payroll. Such an organizer is not free to be subject to the control of TCE. On the contrary, the salted organizer's obligation is to confront and defy efforts of TCE to exercise control over the salted organizer.

These concerns are not just theoretical. In addition to the conduct of Malcolm Hansen, there is other evidence of the extent to which the Union may exercise control over salted organizers. For example, the General Counsel of the NLRB recently reported on a case of salting in the

"General Counsel's Report" issued November 28, 1994, Daily Labor Report (BNA), No. 226, D-1, D-2, D-3 (Nov. 28, 1994). In that case, the union directed the "salts," who had been planted with a nonunion electrical contractor, to go on strike and then, one hour later, unconditionally offer to return to work, then engage in a slowdown when they came to work, including coming in late and standing around talking. When the slowdown caused the employer to fall behind schedule, the salts circulated and submitted to the employer a petition in which employees demanded a \$3.00 per hour increase in pay effective immediately. When the employer refused the increase, the union told the employer it would "stop the games" if the employer would sign a bargaining agreement with the union.

Shortly thereafter, several of the employees, led by the salts, went out on strike, and then, twenty minutes later, unconditionally offered to return to work. Later that month, a "salt" demanded that the employer provide employees with health insurance and threatened that employees would strike if the employer refused. When the employer didn't accede to that demand, the employees went on strike. Two hours later, they made an unconditional offer to return to work. Shortly thereafter, the employer discovered that work materials had been hidden above ceiling tiles and behind walls, and that unknown employees had engaged in substantial miswiring. The employer claimed that the above course of conduct caused it to lose over \$100,000, and forced it to go out of business.

Other examples of the type of control that may be exercised by the Union over its "salts" can be found in an article by Wharton School Professor Emeritus Herbert R. Northrup titled, "'Salting' the Contractor's Labor Force: Construction Unions Organizing with NLRB Assistance," published in the Journal of Labor Research, Vol. XIV, Number 4, Fall, 1993, pp. 475-479, referred to at greater length hereinbelow.¹⁸

In addition to the control imposed on the salted organizers herein by the fear of discipline for violating the salting resolution, the Union controlled the salted organizers by paying them. In NLRB v. Elias Brothers Big Boy, Inc., 327 F. 2d 421 (6th Cir. 1964), the court found that the organizer was employed by the union because she was paid \$15.00 a week to cover expenses for telephone calls to employees during her organizing efforts and for gasoline to use in her car in driving employees home from work so that she could talk to them about the union. Shortly after her termination as a waitress from the employer, she became a full-time paid union organizer for the union.

The holding in the Elias case is supported by additional authorities. It has been held that the waiver of a dues obligation (McCarty Processors, Inc., 286 N.L.R.B. 703 (1987)), a free jacket (Owens-Illinois, 271 N.L.R.B. 1235 (1984)), free medical screening (Mailing Services, Inc., 293 N.L.R.B. 565 (1989)), free insurance coverage

¹⁸ Copies of Professor Northrup's article have been lodged with the Court for its convenience.

(Wagner Electric Corporation, Chatham Division, 167 N.L.R.B. 532 (1967)), or a \$5.00 gift certificate (General Cable Corp., 170 N.L.R.B. 1682 (1968)) coerces employees and can, in effect, destroy the ability of an employee to act in the capacity of a bona fide independent employee of an employer. It follows that being a paid union organizer renders a person incapable of being a bona fide employee of a nonunion employer.

A similar conclusion was reached by Member Kennedy in his dissenting opinion in Oak Apparel, Inc., 218 N.L.R.B. 701, 702 (1975):

In my view, Mary Calligaris and Antoinette Jackson were paid professional organizers employed by the Union and were not employees of the Respondent entitled to the protection of the Act.

. . . .

In my view, the Union controlled their employment through the device of compensation and expense reimbursement arrangements, as well as a plan for obtaining backpay awards from the employees after the completion of unfair labor practice proceedings conducted by the Board. . . . In my opinion, the Union's direction of the employees' 'employment' efforts with regard to such important elements as time, place, and duration gives clear evidence of the fact that Calligaris and

Jackson were in reality employed by the Union and not by Respondent.

Id. at 702.

See also, the ALJ's decision, on facts similar to those herein, in WACO, Inc., 316 N.L.R.B. No. 9 (1995)¹⁹ issued December 23, 1992, after the NLRB issued its decision herein:

In the instant case, under the terms of the Salting Resolution, it would have been possible for [the union's business manager] to have terminated the employment of all of the electricians, at any time, in his sole discretion. In these circumstances, where the Union retains control over the very existence of the employer-employee relationship, it would be a distortion of the Act to conclude that these individuals were 'employees' of Respondent under Section 2(3) of the Act.⁸

[Fn. 8] This conclusion is consistent with NLRB precedent applying the common law 'right of control' test in defining

¹⁹ The NLRB remanded the case to the ALJ in light of the decisions in Town & Country Electric, Inc., 309 N.L.R.B. 1250 (1992) and Sunland Construction Co., Inc., 309 N.L.R.B. 1224 (1992). The ALJ subsequently dismissed the complaint, finding no discrimination, and the Board upheld his findings.

employee status under Section 2(3) of the Act in the following terms:

Under this test, an employer-employee relationship exists where the person for whom the services are performed reserves the right to control not only the end to be achieved but also the means to be used in reaching such end. (citations omitted)

Id. ALJ slip op. at p. 4.

In the instant case, the two business agents received their full salaries from the Union. The Union paid Hansen One Thousand Ninety-One and 82/100 Dollars (\$1,091.82) for his three days' work for the Union at Boise Cascade. J.A. 259. That pay was in addition to, and substantially greater than, the Seven Hundred Twenty-Five and 15/100 Dollars (\$725.15) Hansen received from Ameristaff for that same period of time. J.A. 201. The Union's business manager testified that, pursuant to the Union's salting resolution, all salts were to be paid on the same basis. J.A. 24-26. That means they were to receive full Union scale, plus fringe benefits, just like the salaried business agents (and, in effect, Hansen), in addition to the pay they received from the targeted nonunion employer. Clearly, the salted organizers were not dependent financially on TCE.

Under the salting resolution, the Union's control applies at all times; it is not just limited to nonworking

time.²⁰ The Union's control during working time over the salted organizer, Malcolm Hansen, who was successfully planted on the crew of the targeted nonsignatory contractor herein, illustrates the Union's exercise of control over "salts" while they are working for the targeted employer. Hansen spent much of his working time disrupting the work of TCE employees and talking to them about why they should be represented by the Union. Hansen aggressively persisted in his efforts to persuade TCE employees to seek representation by the Union even though he repeatedly and vehemently was rebuffed by TCE's employees. And, when he was released by Ameristaff and was not hired by TCE, Hansen immediately left the site and drove through the night so he could get to the Union's office the first thing the next morning to begin preparation of the unfair labor practice charge herein. J.A. 72.

TCE's inability to control Hansen's conduct by the threat of discipline illustrates the inability of targeted

²⁰ Local 292's new salting resolution directing salts only to engage in organizing on non-work time shows that under the salting resolution in effect in this case salts were expected to engage in organizing and other activities on behalf of the Union while they were supposed to be working for the targeted employer. The change in the salting resolution is immaterial since the Union still reserves the power to control the salt at all times and, at all times, the salt remains subject to the obligation to serve the Union's interests, which conflict with those of the employer. The Union's revised salting resolution is like a lawyer claiming to suspend his or her representation of one client while attending a meeting at which the lawyer represents another client with conflicting interests to those of the first client.

nonunion employers to control salted organizers.²¹ That's because the salted organizer isn't financially dependent on the nonunion employer. The salted organizer doesn't worry about being discharged by the nonunion employer — the organizer simply will return to employment with a unionized employer after providing the Union with an opportunity to file unfair labor practice charges against the targeted nonunion employer as part of the Union's campaign to inflict economic pain on that employer, a practice described by Professor Northrup in his article on salting. *Journal of Labor Research*, *supra*. Indeed, Hansen's work record maintained by the Union shows that Hansen was employed by a union signatory employer throughout the time he ostensibly was employed by Ameristaff on TCE's crew. J.A. 281. Indeed, discharge by the targeted employer may even be a badge of honor. Thus, the basic elements in the *bona fide* employment relationship that make it feasible for an employer to maintain discipline are absent with salted organizers.²²

²¹ Asserting that an employer may effectively protect its interests through the disciplinary procedure is similar to asserting that lawyers should eliminate the rules relating to conflicts of interest because clients may sue them for malpractice.

²² The ineffectiveness of employer discipline as a means of enforcing discipline against a salted organizer is also shown by the fact that, though TCE refused to hire Hansen because of his violation of TCE's no-solicitation rule, the NLRB held that refusal to be unlawful because the NLRB found, based on the presumption of TCE's unlawful motivation, that TCE's action was discriminatorily motivated.

In summary, salted organizers are subject to the union's control throughout the time they ostensibly are working for TCE. That control is enforced both through the compensation the organizers receive and the punishment they risk if they fail to comply with the Union's instructions. Thus, the Union has paramount control over the salted organizer throughout the time the salted organizer is on TCE's payroll.

2. **The Union's interests conflict with those of the targeted nonsignatory contractor.**

In the context of union organizing, if the interests of the union and the targeted nonunion employer are the same, it is likely that salting will be declared in violation of § 8(a)(2) of the NLRA which prohibits employers from assisting a union to become the representative of the employer's employees. Cf. Windsor Castle Health Care Facility, Inc., 310 N.L.R.B. 579 (1993) *enfd.* 13 F.3d 619 (2nd Cir. 1994).

Therefore, it is reasonable to assume that where the salting strategy is used, the employer is not affirmatively in favor of unionization, i.e., the interests of the union and the targeted nonsignatory employer are not the same.

An organizing union using the salting strategy and the contractor targeted by that strategy have a legitimate conflict of interest. As acknowledged by Member Oviatt in his concurring opinion in Sunland, *supra*, which was consolidated with the instant case for oral argument before the NLRB, "... the relationship between a nonunion employer and a union seeking to organize its employees is

usually adversarial, and sometimes quite heated." *Id.* at 1231-1232. See also, Labor Relations Law in the Private Sector, F. Bartosic and R. Hartley, pp. 60-61 (1986). "In administering [the NLRA], the Board and the courts seek to accommodate the legitimate, but competing, and at times conflicting, interests of the employer, the employees, the union, and the public at large. . . . The clash of competing and conflicting interests is perhaps most apparent in the context of union organizational campaigns . . ."

In the U.S. Department of Labor and Department of Commerce's "Commission on the Future of Worker-Management Relations, Fact Finding Report," Exhibit III, page 88, Joe Crump, Secretary-Treasurer of the United Food and Commercial Workers Local 951 is quoted as testifying, "Organizing is war. The objective is to convince employers to do something that they do not want to do. That means a fight. If you don't have a war mentality, your chances of success are limited."

The NLRA contemplates that an employer and a union have equal rights to compete for the support and the votes of the employer's employees. The NLRA recognizes that an employer and a union seeking to unionize its employees have conflicting interests and that law provides rules within which those adversarial interests can legitimately compete for the favor of the employees. The Union's pursuit of its interests can lead to the type of employer-damaging conduct described in the Troublemaker's Handbook, *supra*, Professor Northrup's article on salting and the case of salting in the "General Counsel's Report" of November 28, 1994.

Salted union organizers have an irreconcilable conflict of interest with TCE. A paid union organizer who is successfully planted on TCE's payroll has ample opportunity to serve the interests of the organizer's primary master, the Union, by acting adversely to the interests of TCE while masquerading as an employee of that contractor. The salted organizer can cast TCE in a bad light in the eyes of the employees by the decisions the organizer makes and the manner in which the organizer works, or doesn't work, as well as by what the organizer says and does. That is in direct conflict with an employee's obligation to TCE to apply the employee's best efforts to perform work assigned by TCE and to work in furtherance of the TCE's interests while in the TCE's service.

Because the salted organizer can conceal this conflict of interest, both the employees and the employer may be misled to believe that the organizer is acting independently, when, in fact, the organizer is merely doing what the union has paid the organizer to do. It is the corruptness of this situation which is one of the reasons the law of agency leads to the conclusion that the paid organizer cannot, in good faith, become an employee of the nonunion contractor.

Examples of on-the-job strategies available to the salted organizer for use against TCE may be found in the chapter entitled "Shop Floor Tactics" in the Troublemaker's Handbook, *supra*, wherein it states, "successful organizing requires rank and file action, visible organizing on the shop floor in confrontation with management." *Id.* at 11. The Union has many ways to bring economic pressure short of a strike:

- **Work-to-rule** campaigns in which workers adhere exactly to company procedures or to the contract.
- **Slowdowns**, in which members reduce output to an agreed amount.
- **Making scrap**, producing products which will not pass quality control.
- **Getting lost**, a common practice of warehouse workers, maintenance crews, truck drivers and others who work in large facilities or on the streets and are not easily accessible to police. Some of these practices can get you disciplined; for example, truck drivers may be charged with 'stealing time.'

Id. at 16.

The salted organizer's arsenal is not limited to on-the-job-strategies. In his article entitled "'Salting' the Contractors' Labor Force: Construction Unions Organizing with NLRB Assistance," Journal of Labor Research, *supra*, Professor Herbert R. Northrup describes several cases of salting activities, primarily those of the IBEW, with which the Union involved in this case is affiliated, and the Boilermakers' Union, including strikes, slowdowns and undermining of productivity, and he concludes that the primary purpose of the salting strategy appears not to be to persuade the employer's nonunion

employees to become unionized, but, rather, to inflict or threaten sufficient economic pain on the targeted employer so that the employer signs a union contract without regard to the wishes of its employees. Professor Northrup states at page 479:

It is quite clear from these cases that the NLRB plays a big role in the unions' salting strategy. The blunt memoranda from Michael Lucas, the IBEW salting chief, also clearly demonstrates that salters are often not interested in permanent employment. Rather, they frequently are devoted to harassment, destruction of productivity, or even in the case of a very successful open-shop builder like BE&K, elimination of the company itself unless it changes its ways and agrees to unionization.

Professor Northrup's conclusions²³ are confirmed by the case reported in the "General Counsel's Report" issued November 28, 1994, referred to in more detail

²³ See also, Sullivan Electric Company (Administrative Law Judge's Decision), JD (NY)-04-95, Case Nos. 26-CA-16107 and 16157, 1995 NLRB Lexis 82 (Feb. 1, 1995), at p. 5, in which the ALJ concluded that the objectives of the IBEW's salting program included creating enough trouble and problems in the way of strikes, lawsuits, unfair labor practice charges and general tumult to force the nonunion contractor off the job or to make that contractor reluctant to bid in the area again.

above,²⁴ where massive and repeated disruptions of the contractor's operations resulted in the destruction of the contractor's business. Even if the salted organizers in that case hadn't engaged in "unprotected" activity, their "protected" activity would have resulted in serious injury to the employer's business. Inflicting serious injury to an employer's business is clearly contrary to that employer's interest. Yet, serious injury to an employer's business is one of the objectives of unions that engage in the salting strategy.²⁵

The conflict of interest between a union and a targeted employer is not limited to the construction industry. If salted organizers are considered employees of the targeted employer, they may be used in any industry.

²⁴ See pages 18-19.

²⁵ In Sullivan Electric Company, *supra*, Michael D. Lucas, the person in charge of the IBEW's salting program, testified regarding that program. Part of his evidence included a booklet titled "Salting As Protected Activity under the National Labor Relations Act", published by the IBEW. According to the ALJ, that booklet described the source of the term "salting" as follows, "We derived the term from the process of 'salting' mines in order to artificially enrich them by placing valuable minerals in some of the working places. The organizing potential in nonunion bargaining units is likewise artificially enriched by 'salting' valuable craftsmen in some of the working places." Sullivan Electric Company, *supra*, at slip op. at 3. The administrative law judge, Raymond P. Green, commented in footnote 3 of his Decision, "I wonder if the Union is aware of the irony of the salted mine analogy. Here, the employer is claiming that the Union's attempt to salt the job site by inserting members on the job, is similarly a fraudulent scheme to get people on the job who do not really intend to become employees." *Id.*

And, their use need not be limited to situations in which the targeted employer's employees are unrepresented. Salts could be used in a battle for representative status between several unions.

The control the Union has over a salted union organizer while that organizer ostensibly is working for TCE, combined with the express union objective the organizer is contractually required to pursue, prevents that organizer from being subject to the control of TCE. This conflict makes it impossible for the paid union organizer to enter into a bona fide employment relationship with TCE.²⁶

The fact that a paid union organizer performs some physical tasks for a nonunion employer it is directed to organize does not change this analysis since the organizer only performs those tasks because the salt is directed to do so by the union. Clearly, if an individual performed no work at all for an employer and simply stood around handing out union literature, an employer would be justified in terminating that individual. An employer has a right to expect a full day's work for a full day's pay.

²⁶ Where there are two masters with conflicting interests, the paramount master need not be the first master to enter into an agency relationship with an employee. An employee of one employer could abandon the obligation to submit to the control of the first employer, thereby ceasing to be an agent of the first employer, and agree to take on the conflicting obligation of submitting to the control of the second employer. In that case, the second employer would become the primary employer and the first employer would become the secondary employer, and the person would only be considered an "employee" with respect to the second employer.

By performing organizing activities during work time and by otherwise being obligated to give primary consideration to the Union in everything he or she says and does, a salted organizer is incapable of fulfilling his or her duty to TCE.

As the Fourth Circuit stated in its decision in H. B. Zachry v. NLRB, 886 F.2d 70, 73 (4th Cir. 1989):

If Edwards simultaneously performs services for Zachry at his union employer's behest, he nonetheless remains in the union's employ even though he receives some remuneration from Zachry. He cannot be considered an employee of Zachry since he is performing services for Zachry only because instructed to do so by his union employer. This is not to say that an employee owes his employer some type of transcendent loyalty; rather, it is only to emphasize that the plain meaning of the term 'employee' contemplates an employee working under the direction of a single employer. The term 'plainly' does not contemplate someone working for two different employers at the same time and for the same working hours.

Id. at 73.

It was this same conflict which troubled the ALJ in Anthony Forest Products, 231 N.L.R.B. 976 (1977). In that case, the ALJ stated:

I personally have great difficulty in understanding how an individual can be an employee of two different employers at the same time for the same working hours. There is a certain master-servant relationship encompassed in any employer-employee relationship which is absent under such circumstances. However, I am bound by the Board's Decision and shall find accordingly.

Id. at 978, n.6. Judge Harmatz, in the first Sunland case, expressed similar concerns. See, Sunland, *supra*, at 1246.

The distinguishing factor is that the paid Union organizer acting pursuant to a salting resolution is not free to act as he or she wishes while working for TCE, and, therefore, is not subject to TCE's control. The salted organizer is required by the organizer's paramount contractual commitments to the Union imposed by the salting resolution to give precedence to the interests of the Union to the extent those interests conflict with those of TCE. The only way the salted organizer can be free to serve TCE's interest would be to resign from the Union, i.e., abandon its relationship with the Union. It is this paramount employment relationship with the Union which the law of agency recognizes as, by definition, inconsistent with a bona fide employment relationship with TCE.

3. Bona Fide employees who are zealous union supporters without a contractual commitment to act contrary to the interests of the employer do not have a conflicting agency relationship.

The law of agency only disqualifies a person from being an agent if that person is controlled by a conflicting agency relationship. A zealous union supporter who has **not** entered into a contractual relationship with a union requiring the union supporter to work in furtherance of the union's effort to unionize the targeted nonunion employer's employees would be an "employee" of the nonunion employer within the meaning of § 2(3) of the NLRA, because the union supporter has not entered into a conflicting agency relationship. The avid union supporter is, in a legal sense, subject to the nonunion employer's control.

In the instant case, the salted organizers were not merely zealous Union supporters who, of their own free will, supported the Union. Rather, they were contractually committed to the exclusive service to the Union.

The motive of the applicant or employee is immaterial. The issue under the law of agency is whether the prospective employee is free to enter into an agency relationship with the employer, as that relationship is defined by the law of agency. The determining factor is whether the organizer simultaneously is controlled by another master with conflicting interests. If the organizer is free from that control, then the organizer is not

disqualified from being an employee of the nonunion employer.

Therefore, it is immaterial whether the targeted employer knows the salted organizer is an agent of the union²⁷ or if the employer has a motive that would be considered discriminatory against a salted organizer. The issue herein is like the issue in unfair labor practice cases where the object of the alleged unfair labor practice was a supervisor, managerial employee, independent contractor or a child of the business's owner. In those cases, discriminatory motive is immaterial.²⁸ The sole issue is

²⁷ As illustrated by the examples of salting described by Professor Northrup in his article on salting, Journal of Labor Research, *supra*, salted organizers sometimes conceal their relationship with a union. Requiring an employer to know of the salted organizer's agency relationship before a person would be disqualified from becoming an agent due to a conflicting agency would not only ignore the fact that the requirements of the law of agency are not dependent on the knowledge of the master, but would encourage concealment of the conflicting relationship by deception and stealth. Moreover, it does little good for the NLRB to say that salts' right to vote can be challenged, if the employer doesn't know of the salts' relationship to the union. *See, also, Oak Apparel, supra*, at 706 wherein the ALJ found that the paid union organizer admitted lying in previous NLRB cases.

²⁸ The argument that TCE's motive is material relies on dicta, based on a questionable foundation, in cases dealing with discrimination between different types of nonemployees. And, there is no allegation that TCE's employees were unable to obtain information regarding unionization. On the contrary, they were well informed on the subject and had decided they weren't interested. The issue herein is whether the people in question are entitled to the status of

(continued...)

whether the alleged discriminatees had the protected status of "employee."²⁹

Even if the zealous union supporter is a member of the union, that doesn't create a conflicting agency relation-

²⁸(...continued)

"employee" with the full protection of and all the rights provided by the NLRA. Therefore, it is immaterial whether TCE was discriminatorily motivated. *See, e.g., NLRB v. Big Three Welding Equipment Co.*, 359 F.2d 77, 80, (5th Cir. 1966) (discharge of employee who was found to be a supervisor is not a violation of § 8(a)(1) or § 8(a)(3), regardless of the employer's motivation); Parker-Robb Chevrolet, Inc., 262 N.L.R.B. 402, 404 (1982), rev. den. sub. nom., Automobile Salesmen's Union v. NLRB, 711 F.2d 383 (D.C. Cir. 1983) (no violation for discharging supervisor for union activity or affiliation); Campbell-Harris Electric, Inc., 263 N.L.R.B. 1143, 1143-1144 (1983), *enfd.* 719 F.2d 292 (8th Cir. 1983) (discharge the son of the owner because of union affiliation).

²⁹ It is argued that TCE didn't know that the salted organizers were seeking employment at the behest of the Union. That argument is contrary to the record and is not pertinent to the issue before the Court.

It became apparent after the second interview that there was indeed an organized Union-sponsored activity occurring. The ALJ and the NLRB found that Buelow reported to the interviewers that the uninvited applicants were from the Union. And, Hansen, who was part of the job-demanding, threatening group of people from the Union, made no secret of his affiliation with the Union. While TCE may not have known the precise terms of the relationship between the Union and the salted organizers, it was apparent that they were working together and were present at the behest of the Union. In this context, it is a remarkable statement of TCE's lack of anti-union motivation that Hansen was hired.

ship, because the general obligation of a union member does not include a specific contractual obligation to act as a salt against a targeted nonunion employer. The general rules of unions do not normally contain a specific affirmative obligation to work for the union, under the control of the business manager, in furtherance of the union's organizing drive against a targeted nonunion employer while on that targeted nonunion employer's payroll, nor do they contain any commitment on the part of the union to compensate the member for the services provided to the union by the member. Further, general union rules normally do not contain an express requirement that the member perform organizing duties promptly and diligently, nor do they contain the express right of the business manager to force the member to leave the nonunion employer as soon as the member's organizing service to the union is complete.³⁰ See, J.A. 251-253.

a. **The NLRB's Definition of "Employee" Is Not Entitled to Deference.**

The NLRB's definition of "employee" is not entitled to deference because it rests on erroneous legal

³⁰ Likewise, just because a striker who engages in strike misconduct is a union member doesn't make the member the agent of the union with respect to that misconduct. Union membership doesn't mean the striker was under the union's control when the misconduct occurred. The union will only be responsible for the misconduct if it can also specifically be shown that the member was acting as an agent of the union when the member engaged in the misconduct. NLRB v. Sea-Land Service, Inc., 356 F. 2d 955, 966 (1st Cir. 1966), cert. denied 385 U.S. 900 (1966).

foundations. Cf. Lechmere, supra; Chemical Workers v. Pittsburgh Glass, 404 U.S. 157, 166-168, 92 S.Ct. 383, 390-392 (1971). Congress has repeatedly made it clear that it intended the term "employee" to be interpreted in accordance with the law of agency unless it states otherwise. See, Darden, supra, and the cases cited therein.

The NLRB, by failing to construe "employee" consistent with the law of agency, disregarded the lessons of Darden, supra, and of Lechmere, supra.³¹ Its purpose in doing so apparently was to "promot[e] the right to organize." See, Pet. App. 339-349, Pet. 8, Brief at p. 8. See, § 7, 29 U.S.C. § 157. However, the more neutral purpose of the NLRA is to "protect" the right to organize.³²

³¹ The NLRB argues that the NLRA doesn't indicate Congress intended to exclude salted organizers from the NLRA. In fact, by excluding labor organizations, except with regard to their conventional employees, and their agents or officers from the definition of "employer" in § 2(2), and by excluding individuals employed by a person who is not an employer from the definition of "employee" in § 2(3), Congress did show it did not intend agents of the union such as salted organizers to have the status of "employee" under the NLRA.

³² The NLRB ignores the fact § 7 of the NLRA also protects the rights of employees to refrain from engaging in organizing or other protected concerted activity.

b. NLRB Incorrectly Assumes That the Salted Organizers Are "Employees."

The NLRB, in its extensive discussion of the definition of an "employee" in its Decision herein (Pet. App. 22a-40a), ignores the fact that all the references it cites assume that the person in question is an employee within the meaning of the law of agency. In other words, the NLRB's analysis assumes the issue, i.e., it assumes the alleged discriminatees are employees, and then looks at whether they have engaged in conduct which causes them to lose the protections of the NLRA.

The NLRB's position is that no one has so great a conflict that they are disqualified from taking on the status of agent of both masters. According to the NLRB, the only issue is whether the dual agent has engaged in conduct so egregious or has interests so patently at conflict that, even giving the agent the benefit of the protection of § 7 of the NLRA, the dual agent loses employee status with respect to one of the masters. The NLRB's analysis eliminates the distinction between employees and nonemployees and effectively ignores the provisions of Restatement (Second) of Agency § 226 (1958) which describe situations in which the simultaneous conflicting interests of two masters prevents a person from ever becoming an agent of the second master. Therefore, the NLRB has misinterpreted the statute.

c. NLRB Ignores Conflict of Interest.

The NLRB also seeks to avert the unavoidable consequences of the law of agency by attempting to deny, by definition, that there is a conflict between the interests of the employer and the union seeking to organize the employer. Pet. App. 23a, fn.11; 33a, fn.28. That denial is ineffective because it assumes that the salted organizers are entitled to the protections of the NLRA and, because employers and unions do have conflicting legitimate interests in an organizing situation. As described above, an employer, and a union that is willing to inflict serious economic pain on that employer, do have conflicting interests.

The inappropriateness of the NLRB's failure to recognize the conflicting interests of the salted organizer becomes even more apparent when one compares "salting" to the actions of a manufacturer competing for a billion dollar contract who assigns one of its employees, who has been hired to obtain that contract as part of his job, to secure employment with the employer's chief competitor. The manufacturer then orders its employee to do everything he or she can to aid the manufacturer's quest for the billion dollar contract while working for the manufacturer's competitor.

Or, compare a law firm representing the defendant in a crucial case that assigns one of its employees who is working on the case, as part of his or her job, to obtain employment at the law firm representing the plaintiff in the lawsuit, and to do everything possible to help the

defendant win the case while working at the plaintiff's law firm.

In both of the foregoing scenarios there are conflicting duties which are to be performed simultaneously. However, it is impossible for the employee to do justice to both employers. In fact, the situations described in those examples might be characterized as spying or espionage. Yet, they are essentially the same as "salting."³³

Indeed, compare the obverse of salting, i.e., an employer planting its employee in a union position to collect information and otherwise further the interests of the employer. That practice has been considered spying and industrial espionage. It caused a public outcry, and its abolition was considered crucial by Congress. See, From The Wagner Act To Taft-Hartley: A Study of National Labor Policy and Labor Relations, H. Millis and Emily

³³ The distinction between relationships with and without inherent conflicts of interest is illustrated by the IBEW, Local 292's example, on pages 32 and 33 of its brief, of the city detective working for a restaurant while investigating the customers of the restaurant. As Professor Seavey notes, such a relationship doesn't cause an inherent conflict of interest. Assume, however, that Professor Seavey's example was changed so that the city detective was investigating the restaurant. In the latter case, there would be an inherent conflict of interest because the detective would be simultaneously pursuing the conflicting interests of the city, who was trying to convict the restaurant of a crime, and the owner of the restaurant presumably wanting to operate lawfully and not wanting to be convicted of a crime. Thus, Professor Seavey's analysis is consistent with TCE's position herein.

Clark Brown, at page 101. See also, Fruehauf Trailer Company, 1 N.L.R.B. 68, 73 (1935), in which the NLRB held that an employer violated the NLRA by having its employee apply for and obtain employment with the union that represented its employees.

The NLRB itself recognizes in these salting cases that, at least in some situations, there is an irreconcilable conflict of interest that prevents a paid union organizer from having a bona fide employment relationship with a targeted employer. In Sunland Construction Co., Inc., supra, at 1230-1231, a companion case to the instant case at the oral argument before the NLRB, the NLRB held that, in a strike situation, the interests of the salted organizer are sufficiently inconsistent with employment with the struck nonunion employer to be considered "inherently and unmistakably inconsistent with employment [for the nonunion employer] behind a picket line." Yet, the interests of that nonunion employer were only marginally different before the strike.

The same economic battle that is fought on the picket line is also carried on in the workplace. See, the discussion in The Troublemaker's Handbook: How To Fight Back Where You Work - And Win!, supra.

TCE's interest in preserving its business applies to on-the-job strategies with no less force than it applies to strikes. TCE's right to seek to prevail in its struggle for the support and the votes of its employees is no less significant to TCE than an employer's struggle to prevail in a strike situation. Indeed, as occurred in the case reported in the NLRB "General Counsel's Report" of

November 28, 1994, a union's organizational campaigns could result in strike-like action. The same inherent and unmistakably inconsistent interests exist in both situations. It is inappropriate for the NLRB to attempt to distinguish between those two situations, and it has inadequately explained why it has done so.

In describing the agent-of-a-striking-union exception in Sunland, the NLRB used a breach-of-obligation analysis³⁴ to analyze a conflicting agency relationship of the type referred to in the Restatement (Second) of Agency § 226 (1958).³⁵

³⁴Incorporated in that analysis was the NLRB's erroneous assumption that everyone is entitled to the protections of § 7. Those protections significantly increase the threshold which the conflict of interest must exceed before it disqualifies the salted organizer.

³⁵ The conflict of interest of a salted union organizer seeking employment with the targeted nonunion employer is inherent and pervasive. It goes to the very core of the relationship and prevents the salted organizer from entering into a bona fide employment relationship with the targeted employer. This conflict of interest is distinguished from a mere breach of an obligation to an employer.

A breach of an obligation to an employer only occurs after the employment relationship exists. And, it doesn't prevent the employment relationship from coming into existence.

In the case of the salted organizers, their pervasive and inherent conflict of interest prevents them from ever becoming an agent of the targeted nonunion employer. The breach-of-obligation analysis is inapposite because the salted organizer never effectively took on any obligation to the targeted nonunion employer.

In summary, the NLRA does not protect those persons who are not capable of being "employees" as defined by the law of agency. A person may not simultaneously be the agent of two employers who have conflicting interests. Because of the control exercised by unions over salted organizers through salting resolutions and money, the salted organizers are incapable of entering into a bona fide employment relationship with a targeted nonunion employer. Therefore, the Eighth Circuit correctly held that an employer has no obligation under the NLRA to treat union agents as its employees or to afford union agents the protections of the NLRA.

d. The Eighth Circuit's Holding Does Not Lead To Absurd Results.

It is not absurd to hold that a person may not have two masters with conflicting interests. The Eighth Circuit's decision is limited to those who enter into a relationship with the Union which prevents them from agreeing to serve the interests of a particular employer; it doesn't prevent zealous union supporters who have not submitted themselves to contractual control by the Union from becoming "employees" of nonunion employers. It does, however, preserve the integrity of the employment relationship between employers and their employees.

The Eighth Circuit's holding only applies in the narrow situation in which a person has become the agent of the Union for a purpose that conflicts with the interests of the particular employer with whom that person is seeking to become an "employee." Those people remain employees of the Union, and they are not disqualified

from being an employee of any employer other than the targeted employer.³⁶

People who contractually bind themselves to the task of unionizing the employees of a nonunion employer have given up their freedom of choice with respect to the targeted employer. To give these paid agents of the union the status of employee and, through concealment, the ability to vote, is repugnant to the democratic processes that are central to the NLRA. The salts have voluntarily withdrawn themselves from the group Congress intended to protect, just as someone does who becomes a supervisor, managerial employee or independent contractor. That is a rational result consistent with the statute which preserves the democratic process on which the NLRA is based.

e. The Eighth Circuit's Holding Does Not Thwart Congressional Intent.

Congress adopted the NLRA to protect the freedom of employees to choose whether or not they wish to be represented by a labor organization or whether or not they

³⁶ The circular definitions of "employee" in other statutes will not necessarily result in salted organizers not being considered employees under those statutes. For example, the definition of "employer" under the Fair Labor Standards Act, which is used in the Family and Medical Leave Act, includes "suffer or permitting to work," which expands the definition of "employee". See, e.g., *Darden, supra*. Moreover, the salted organizer would be protected by those other statutes in the organizer's employment relationship with the union, and the union would be responsible for its agent's conduct under the law of torts.

wish to engage in protected concerted activity. Salted organizers have removed themselves from that protected group by giving up their freedom to make those choices. The Eighth Circuit's decision merely recognizes that the salted organizers are no longer in the group that Congress intended to protect. On the other hand, the NLRB's analysis would eliminate the distinction between employees and nonemployees, expanding the scope of the NLRA far beyond the scope intended by Congress.

The provisions of § 302(a) of the Labor Management Relations Act (29 U.S.C. § 186(a)) are consistent with the Eighth Circuit's holding. Section 302(a) merely recognizes that there may be situations in which a person could work both for a union and for an employer without being an agent serving masters with conflicting interests. That would normally be the situation where union stewards and other officials are expressly recognized in the collective bargaining agreement and are authorized to engage in their union activity. Section 302 does not purport to state that every employee of a union is also an employee of the employer, any more than it converts a child of the owner of an employer, or a working supervisor of a unionized contractor, who is also a paid union official into an "employee." Section 302 does not purport to change the definition of "employee." It only recognizes that there are situations in which a person could be an agent of both a union and an employer consistent with the law of agency.

On the other hand, a finding that salted organizers were "employees" effectively eliminates the distinction between employees and nonemployees and would transfer

significant power to the union in its competition with employers and tip the balance in favor of the union. In view of Professor Northrup's findings that salting strategies seem to be used to inflict sufficient pain on the employer to force the employer to enter into a union agreement or go out of business, without regard to the wishes of the employees, it is the employees of the targeted employers who are the ultimate losers in the salting strategy, contrary to the purpose of Congress to protect the right of choice of those employees.³⁷

CONCLUSION

This case is similar to the Darden case, *supra*, in which this Court was asked to determine whether a circular definition of "employee" in ERISA should be interpreted in accordance with the law of agency or be expansively interpreted by the Court in light of the mischief to be corrected. This Court recognized that, on several occasions, when this Court approved a definition of employee that went beyond the common law, Congress amended the statute to demonstrate that it wanted the common law of agency definition to apply. In Darden, the Court recognized that Congress intends a common law definition of "employee" to apply unless it clearly states otherwise, and that concern about the mischief to be corrected should be left primarily to Congress.

³⁷ The Boilermakers' Union in footnote 1 (page 3) of their Brief note that their effort to force Sunland Construction Co., into signing collective bargaining agreements without a representation election was successful.

The NLRA's use of a circular definition of "employee" confirms that Congress intended the common law definition to apply. The common law provides that a person may not be the servant of two masters if service to the one requires abandonment of service to the other.

In this case, the salting resolution prohibits salted organizers from having any purpose in working for the targeted employer other than acting in furtherance of the Union's organizing campaign. The only way the salted organizer could agree to serve the employer's interests is if the organizer resigned from the Union, i.e., abandoned the Union's service. Since the salted organizers were committed to the Union, they were not free to become agents of the targeted nonunion employer. Therefore, they were not "employees" within the meaning of the NLRA with respect to that employer.

As in the Darden case, *supra*, the government asks the Court to ignore the law of agency and expand the definition of "employee" to include everyone who isn't expressly excluded by § 2(3) of the NLRA. In effect, the NLRB is asking this Court to ignore the lessons of the Darden case. TCE asks the Court to heed those lessons and to uphold the Eighth Circuit's decision.

Respectfully submitted.
James K. Pease, Jr.
[Counsel of Record]

Douglas E. Witte

April, 1995

(15)
No. 94-947

Supreme Court, U.S.

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In the Supreme Court of the United States

OCTOBER TERM, 1994

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

TOWN & COUNTRY ELECTRIC, INC., AND
AMERISTAFF PERSONNEL CONTRACTORS, LTD.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

REPLY BRIEF FOR THE
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In the Supreme Court of the United States

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NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

TOWN & COUNTRY ELECTRIC, INC., AND
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UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUITREPLY BRIEF FOR THE
NATIONAL LABOR RELATIONS BOARD

1. Respondent's brief, like the decision below (see Pet. App. 7a-8a), is based on the premise that the text of the National Labor Relations Act (Act) is entirely unhelpful on the question whether a worker for hire or an applicant for such a position who will be paid by a union for his organizing activity is a statutorily protected "employee." Respondent argues (Br. 8, 10) that the Act's definition of "employee" in Section 2(3), 29 U.S.C. 152(3), is "circular" because it defines "employee" as "any employee" subject to seven specific exclusions; from this, respondent claims (Br. 10, 38-39) that it follows that whether a paid union organizer is an "employee"

must be answered wholly by reference to the common law of agency. Respondent, however, elects not to respond to our contention (Br. 17-20) that another provision of the Act—Section 7, 29 U.S.C. 157—supplies considerable guidance on that question. Section 7 guarantees “employees” the right to organize, and thus makes it clear that a worker who is otherwise a statutory “employee” (such as a worker for hire) does not forfeit that status by engaging in union organizing. Under the canon *expressio unius est exclusio alterius*, the absence of any exclusion in Section 2(3) for an employee who will be paid by a union for engaging in those protected organizing activities strongly implies that such a worker is a statutory “employee.” Thus, as we have explained (Br. 13-23), the Board’s interpretation that a paid union organizer is an “employee” within the meaning of Section 2(3) is correct, and, in any event, should be upheld as “rational and consistent with the Act.” *NLRB v. Curtin Matheson Scientific, Inc.*, 494 U.S. 775, 786-787 (1990).

To the extent that respondent makes any statutory argument, it is that a paid union organizer is not an “employee” because an organizer works for a labor union, which, respondent asserts, is not an “employer” under Section 2(2) of the Act, 29 U.S.C. 152(2). Respondent therefore reasons, under Section 2(3), which excludes persons “employed by * * * any other person who is not an employer as herein defined,” 29 U.S.C. 152(3), that a union’s organizers cannot be statutory “employees.” See Br. 39 n.31; see also Chamber of Commerce Amicus Br. 22-29; Associated General Contractors of America Amicus Br. 9.

Respondent’s reliance on Section 2(2) is unpersuasive for two reasons, as the Board recognized in its decision. See Pet. App. 39a n.36. First, a labor union is an “employer” of its own employees, as the text of Section 2(2) makes clear. Section 2(2) provides:

The term “employer” includes any person acting as an agent of an employer, directly or indirectly, but shall not include the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof, or any person subject to the Railway Labor Act [45 U.S.C. 151 et seq.], as amended from time to time, or any labor organization (*other than when acting as an employer*), or anyone acting in the capacity of officer or agent of such labor organization.

29 U.S.C. 152(2) (emphasis added). More fundamentally, it is immaterial whether a worker’s union is a statutory “employer,” because the worker derives his status as a statutory “employee” not from his relationship with his union, but from his work status, or attempted employment, with the hiring entity in question. For example, an agricultural employee (who is excluded under Section 2(3)) who moonlights for another employer is not deprived of “employee” status at that second employer by virtue of the nature of his agricultural work for the first. Likewise, an employee of the United States (who is excluded under Section 2(3) because the United States is not an “employer” under Section 2(2)) may be a statutory “employee” in his capacity as a worker for hire at a second job. In short, the limitations on the Act’s definition of “employer” have no effect on the “employee” status of a paid union organizer

who works for, or applies for a job with, an entity that is a statutory "employer." And it is common ground that respondent Town & Country is such an "employer."

2. In any event, respondent misapplies the principles of common law agency on which it relies. As we show in our opening brief (Br. 23-33), those principles are fully compatible with deeming a paid union organizer an "employee."

a. Respondent's first common-law argument is that treating a paid union organizer as an "employee" conflicts with the precept that a person may not be an agent of an employer unless the person "is free to act in furtherance of the employer's interests and to submit to the employer's control." Br. 11. Respondent asserts (Br. 16-17, 20-23, 26) that workers for hire who are paid union organizers are beyond employers' control, and that the union organizers in this case were in fact under the "pervasive" control of the Union during work hours by virtue of the Union's salting resolution. As a result, respondent claims, it lacked the ability to direct their work or maintain discipline over them—"the basic elements [of a] *bona fide* employment relationship." Br. 25.

It is true that, at common law, a servant is a person "whose physical conduct in the performance of the service is controlled or is subject to the right to control" by his master or employer. Restatement (Second) of Agency § 2(2), at 12 (1958). But there is no foundation for respondent's claim that an employer is deprived of control over a union-organizing worker merely because a union pays that worker for engaging in that protected activity. As we have noted (Br. 25-26, 32), an employee's Section 7 right to organize leaves the employer free to impose work

rules (including rules that reasonably restrict organizing) and to discipline or discharge an employee who violates such rules. A union's agreement to pay an employee for organizing does no more than add an extra incentive to undertake such activity within those workplace rules. Indeed, the labor laws recognize that it is legitimate for an employee to receive pay from a union while working for an employer.¹

¹ The Labor Management Relations Act of 1947 and the Labor-Management Reporting and Disclosure Act of 1959 both recognize that a union may pay an employee for union service where the employee is also working for, and being paid by, an employer covered by the NLRA. See 29 U.S.C. 186(c)(1) (prohibition on employer payments to officers and employees of a labor organization does not apply to any such "officer or employee of a labor organization[] who is also an employee * * * of such employer"); 29 U.S.C. 432(a)(5) (requiring that officers and employees of labor organizations report any financial transaction with an "employer whose employees his organization represents or is actively seeking to represent, except work performed and payments and benefits received as a bona fide employee of such employer") (emphasis added).

Respondent claims (Br. 20-21) that, in various cases, the Board itself has recognized that the payment of money or gifts "can, in effect, destroy the ability of an employee to act in the capacity of a *bona fide* independent employee." But the cases respondent cites concern the separate issue whether the integrity of a Board-supervised election was violated by virtue of preelection gifts to potential voters. See *Mailing Services, Inc.*, 293 N.L.R.B. 565 (1989); *McCarty Processors, Inc.*, 286 N.L.R.B. 703 (1987); *Owens-Illinois, Inc.*, 271 N.L.R.B. 1235 (1984); *General Cable Corp.*, 170 N.L.R.B. 1682 (1968); *Wagner Electric Corp.*, 167 N.L.R.B. 532 (1967). None of those cases suggests that the payment or gift deprived the subject individuals of their status under the Act as "employees."

Contrary to respondent's claim, the salting resolution (J.A. 256) to which the union members in this case were subject also did nothing to deprive respondent of control over those members. The resolution in no respect suggests that union members working for a nonunion employer should perform work in a subpar manner or violate work rules, and the record does not indicate that the Union sought to exercise any authority over the manner in which Malcolm Hansen, the one paid organizer whom respondent hired, performed his work for respondent. As we have noted (Br. 30-31), the resolution simply exempts union members from a provision in the Union's bylaws that forbade members from working for non-union employers, and the right reserved by the Union to withdraw that exemption leaves the union member free to elect to continue work for the employer and to resign from the Union. Moreover, to the extent that respondent was concerned that employees would prove transitory, it was free to inquire, pursuant to a union-neutral policy, whether applicants were aware of anything that could lead the applicant, if hired, to resign before a given term had run.²

² Respondent bases its claim that it was unable to exercise authority over Hansen on the fact that the Board rejected its attempt to discharge Hansen as unlawful. Br. 4, 5, 24-25. But the Board rejected as lacking credibility respondent's claim that Hansen's performance had been subpar and that Hansen had engaged in union-organizing activity during work time; instead, it found, based on testimony that it credited, that respondent had fired Hansen because he had engaged in protected organizational activity. Respondent's related claim (Br. 3 n.6, 8, 25 n.22) that the administrative law judge employed an unlawful presumption is unfounded and, in any

Respondent also claims (Br. 17-18) that salting resolutions such as the one in this case deprive union organizers of "their freedom to exercise any right under § 7 of the NLRA," such as the right to conclude that "the employees would be better off without the Union." On the contrary, the right of employees to form and join labor organizations, protected by Section 7, includes the right of a union to prescribe lawful rules for its members, including a rule that prohibits a union member from working for a non-union employer. See *NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175 (1967) (union that fined members for crossing its picket line during strike did not commit unfair labor practice of restraining or coercing employees in exercise of Section 7 rights); *Florida Power & Light Co. v. International Bhd. of Electrical Workers, Local 641*, 417 U.S. 790, 793 (1974). A union's discipline of a member who does not comply with the salting resolution does not abridge the member's Section 7 right to refrain from supporting the union, because, as we have noted, the member is free to escape discipline by resigning from the union. Cf. *Pattern Makers' League v. NLRB*, 473 U.S. 95, 102-103 (1985) (noting that, "[t]raditionally, union members were free to resign and escape union discipline," and upholding finding that union committed unfair labor practice in levying fines for violating

event, that issue is not before this Court. The ALJ's decision (Pet. App. 43a-133a) sets out an ample factual basis for his findings of antiunion discrimination. Among those facts was respondent's opposition to the unionization of its employees. See *R.J. Lallier Trucking v. NLRB*, 558 F.2d 1322, 1325 (8th Cir. 1977) ("a general bias or hostility toward the union * * * are [*sic*] proper and highly significant factors for Board evaluation in determining motive").

union rule that forbade members to resign during a strike). Respondent's argument that a union member who agrees to abide by a rule which a union and its members have lawfully adopted is not engaged in concerted activity protected by Section 7, but is instead improperly "controlled" by the union, would eviscerate the Section 7 right to form and join labor organizations and the principle of voluntary union membership.

Respondent and its amici rely on selected union manuals and other materials outside the record of this case in an attempt to show that, as a rule, paid union organizers are directed not only to resign employment upon demand, but also to engage in disruptive activity while on the job. See Resp. Br. 18, 20, 28-30; Associated General Contractors of America Amicus Br. 12-14, 27-28; Labor Policy Association Amicus Br. 11-15. The organizers in this case, however, were subject to no such directive to engage in disruptive activity; moreover, respondent did not rely on such a theory when it fired Hansen for engaging in protected organizing activity, being unaware at the time that Hansen was working pursuant to a salting resolution or was being paid for his organizing efforts. See NLRB Br. 35. More generally, the Board in this case considered and rejected respondent's claim that paid union organizers as a class are more disruptive than other workers. See Pet. App. 37a ("No body of evidence has been presented that would support any generalized, or specific, finding that paid union organizers as a class have a significant, or indeed any, tendency to engage in" acts "inimical to the employer's legitimate interests."). An employer may of course fire a paid union organizer who does engage in unprotected disruptive

practices and is free not to hire such an applicant if the applicant has signalled his intention to engage in disruptive activity if hired. See *Anthony Forest Products Co.*, 231 N.L.R.B. 976 (1977) (no violation in termination of paid organizer for just cause). The employer's latitude to take such action is illustrated by the case cited in the report of the General Counsel of the Board to which respondent repeatedly refers (Br. 18-19, 27, 30-31): in that case, the Board's General Counsel refused to issue a complaint regarding the discharge of paid union organizers who engaged in repeated disruptions of the employer's operations.

b. Respondent also asserts that treating a paid union organizer as an "employer" is inconsistent with a common-law principle which respondent characterizes as follows (Br. 12): "A person may not simultaneously be the agent of two masters with conflicting interests." Respondent, however, mischaracterizes the common law and, more fundamentally, fails to recognize that the Act has modified the common law by protecting the employee's right to engage in organizing activity.

Section 226 of the Restatement (Second) of Agency provides that "[a] person may be the servant of two masters, not joint employers, at one time as to one act, if the service to one does not involve abandonment of the service to the other." Thus, the touchstone for determining, under the common law, whether an individual may be the employee of two employers is not whether the interests of the two employers conflict in some respect, but whether, in working for one, the employee has "abandoned" his employment with the other. See *Webster's New World Dictionary* 2 (1962) ("abandon" means to "give up [something] completely," or "a complete

rejection of one's responsibilities"). The commentary to Section 226 makes clear that the issue of employee status is distinct from the issue whether the employee has breached a duty to the employer. It explains that, even where "giving service to two masters at the same time" involves "a breach of duty by the servant to one or both of them," a person "may cause both employers to be responsible for [that] act." Section 226, cmt. a, at 499. The commentary also notes that a person "may be the servant of two masters, not joint employers as to the same act, if the act is within the scope of his employment for both (see § 236)," and if the act is not such "as to which an intent to serve one necessarily excludes an intent to serve the other." *Ibid.* Section 236, in turn, provides (at 523) that "[c]onduct may be within the scope of employment, although done in part to serve the purposes of the servant or of a third person." The accompanying commentary explains that that rule applies to situations in which "the servant, although performing his employer's work, is at the same time accomplishing his own objects or those of a third person *which conflict with those of the master.*" Section 236, cmt. a, at 523 (emphasis added).³ Thus, the existence of a conflict between a worker's masters or employers

³ The Restatement offers the following example: "A, servant of P, is directed to deliver goods upon the route in a certain order. A, who has received a gratuity from T, a customer, makes delivery in inverse order. All the deliveries are within the scope of employment." Section 236, illus. 3, at 523. Thus, at common law, an individual remains within the scope of his employment, and therefore retains his status as an employee, even where he has been paid by a third party to perform his duties in a manner inconsistent with the employer's express instructions.

does not alone deprive the worker of "servant" or "employee" status, although it may, absent statutory protection for the activity that creates the conflict, supply a basis for lawful discharge of the worker.⁴

Under those principles, it is apparent that a worker such as Hansen does not "abandon" his "employee" status by receiving pay from a union for organizing the work force. The act of organizing does not inherently involve abandoning one's workplace duties or straying outside the scope of employment; on the contrary, until he was unlawfully discharged, Hansen reported to work daily and, as the ALJ found (Pet. App. 119a), properly performed his work as an electrician on respondent's jobsite.⁵ To the extent that an employer may rue the fact that an employee wishes

⁴ Thus, the common-law authorities upon which respondent relies (Br. 14 n.15) are inapposite, for they merely recognize the employee's duty of faithful service to the employer.

⁵ Advancing a new theory of abandonment, respondent suggests that Hansen was in fact employed by a different concern at the same time he worked for respondent, noting that "[t]he Union's records show that Hansen was employed by a Union contractor before, after and during the time he was ostensibly working" for respondent. Br. 5 n.10; see also Br. 25. Although the Union's hiring hall records appear to indicate that Hansen was employed by another electrical concern during that period, those records are apparently inaccurate, for, as respondent is well aware, Hansen could not have been working for another employer during the period he was employed by respondent. Respondent's work was performed at a remote site, and during his work for respondent, Hansen shared living quarters with respondent's other employees and was dependent on respondent for transportation to and from the jobsite. Pet. App. 81a, 85a, 94a, 101a n.61. Hansen's employment application (J.A. 194-196) indicates that he was last employed the month before he began work for respondent.

to engage in organizing or may regard a successful organizing campaign as potentially deleterious to its profitability, Section 7 of the Act, by giving protection to the right to organize, precludes an employer from claiming abandonment based on those concerns. See NLRB Br. 24-25, 32-33; see also Pet. App. 37a ("The fact that paid union organizers intend to organize the employer's work force if hired establishes neither their unwillingness nor their inability to perform quality services for the employer.").

3. Respondent (Br. 42-43) and its amici (Labor Policy Association Amicus Br. 20; Associated General Contractors of America Amicus Br. 26) also liken a union's practice of authorizing members to serve as paid union organizers while working for a nonunion employer to the impermissible employer practice of using employees to spy on co-workers' union activity. The analogy is fundamentally inapt. An employer's use of "spies" violates the Act because it tends to coerce and restrain employees' organizational activity while advancing no legitimate employer purpose. See *J.P. Stevens & Co. v. NLRB*, 380 F.2d 292, 296 (2d Cir.) (upholding Board's finding that an employer's surveillance of union organizers' motel rooms and recruitment of antiunion employees to attend union meetings violated Section 8(a)(1) of the NLRA, 29 U.S.C. 158(a)(1)), cert. denied, 389 U.S. 1005 (1967); *Fruehauf Trailer Co.*, 1 N.L.R.B. 68, 73, 77-78 (1935). By contrast, as Section 7 of the Act reflects, organizational activity on behalf of a union "is at the very core of the purpose for which the [Act] was enacted," *Sears, Roebuck & Co. v. San Diego County Dist. Council of Carpenters*, 436 U.S. 180, 206 n.42 (1978); see also *American Hosp. Ass'n v. NLRB*, 499 U.S. 606, 609 (1991),

and, as the Board has noted, the Act presupposes "that an employee may legitimately give allegiance to both a union and an employer," Pet. App. 38a. See Note, *Organizing Worth Its Salt: The Protected Status of Paid Union Organizers*, 108 Harv. L. Rev. 1341, 1356 (1995) ("The NLRA delimits the employer's control, absolute at common law, over organizational activity and forecloses the contention that loyalty to a union interferes with loyalty to the employer's and the employees' common enterprise."). See also *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 182 (1941) ("Protection of the workers' right to self-organization does not curtail the appropriate sphere of managerial freedom; it furthers the wholesome conduct of business enterprise.").

4. In its brief supporting respondents, the Chamber of Commerce (Br. 14-19) notes that the Board has held that an employer, under the Act, may refuse to hire a paid union organizer during a strike. See *Sunland Construction Co.*, 309 N.L.R.B. 1224, 1231 (1992). See also Amicus Associated General Contractors of America Amicus Br. 27. Noting that the

⁶ Because the Act presupposes no irreconcilable conflict between management interests and union organizing, amicus Chamber of Commerce errs in casting the paid union organizer (Br. 19) as "an agent of the employer's adversary." In any event, while nonunion employers who are "bent upon keeping their operations nonunion" may regard the presence of the paid union organizer in the workplace as "reminiscent of the Trojan Horse," *Sunland Construction Co.*, 309 N.L.R.B. 1224, 1232 (1992) (Member Oviatt, concurring), the decisive fact under the Act is that, as Member Oviatt noted, "the legislative materials and Supreme Court decisions interpreting those materials simply do not provide support for a policy judgment to exclude union organizers from the definition of 'employee,'" *ibid.*

Act protects employees' right to strike, the Chamber of Commerce argues that the Board's distinction between the strike setting (where an employer has the latitude not to hire an applicant based on his status as a paid union organizer) and the non-strike setting (where it does not) is "untenable" (Br. 16).

That argument is without merit. As we explain in our opening brief (Br. 27 n.11), the Board did not base its decision in *Sunland* on the premise that, during a strike, the paid union organizer is a non-"employee" under Section 2(3) of the Act and hence lawfully subject to antiunion discrimination. Rather, the Board held that a refusal to hire a paid union organizer in the strike context does not constitute unlawful antiunion discrimination, because, in that distinct context, the employer has a realistic basis for believing that a paid union organizer, if hired, will act to the detriment of the employer by encouraging other workers to strike. The Board explained:

In our experience, when a company is struck it is not "business as usual." The union and employer are in an economic battle in which the union's legitimate objective is to shut down the employer in order to force it to accede to the union's demands. The employer's equally legitimate goal is usually to resist by continuing production, often with nonunit employees, nonstrikers, and replacements. Thus, an employer faced with a strike can take steps aimed at protecting itself from economic injury. For example, an employer can permanently replace the strikers, it can lock out the unit employees and it can hire temporary replacements for the locked-out employees. Consistent with these principles, we believe that the employer can refuse to hire, during the dispute, an agent of the striking union.

Sunland Construction Co., 309 N.L.R.B. at 1230-1231 (footnotes omitted); see *id.* at 1231 ("given the conflict between an employer's interest * * * in operating during a strike and a striking union's evident interest in persuading employees *not* to help to operate, * * * the [employer] has a 'substantial and legitimate' business justification for declining to hire a paid agent of the Union for the duration of the strike") (quoting *NLRB v. Great Dane Trailers, Inc.*, 388 U.S. 26, 34 (1967)).

The Board's distinction between the non-strike and strike contexts was reasonable. An employer ordinarily cannot refuse to hire a paid union organizer solely because of his status as such, the Board explained, because, absent a strike, there is no basis for inferring detriment to the employer. *Sunland Construction Co.*, 309 N.L.R.B. at 1231 n.41. Rather,

given the statutory protection for forming or joining unions, it cannot properly be said that there is any inherent conflict between carrying out the duties of an employee and operating as a paid union organizer. The aim of inducing fellow employees to join a union is entirely consistent with being a competent employee who obeys work rules such as those time-and-place restrictions on union solicitation that are lawful under *Republic Aviation Corp. v. NLRB* [324 U.S. 793 (1945)] and its progeny. Thus, although we would not permit an employer to presume generally that paid organizers will be disloyal employees, we see no problem with a presumption that someone who is being paid by the organization that is seeking to induce employees to withhold services would not be inclined wholeheartedly to provide services for the duration of the organization's effort.

Ibid. Thus, the decision in *Sunland*, far from being a "paradox" (Chamber of Commerce Amicus Br. 15), reflects the Board's sensitivity to the competing rights of management and of labor in the strike context, and its recognition that, in that discrete setting, legitimate predictions of deleterious employee behavior can be made based on an applicant's status as a paid union organizer. *Sunland* does not undermine the Board's determination that such organizers are, in all contexts, "employees" protected against unjustified antiunion discrimination.⁷

5. Finally, the Chamber of Commerce contends (Br. 12, 25) that, by treating paid union organizers as "employees," the Board has executed an "end run" around *Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992), in which this Court upheld the right of employers to restrict the access of nonemployee or-

⁷ Attempting to undermine the distinction drawn by the Board in *Sunland*, the Chamber of Commerce (Br. 16) postulates that, if an employer hired a paid union organizer, and if the union then called a strike but instructed the organizer "to continue to work behind the picket line," the employer would then be allowed, under *Sunland*, to discharge the same organizer whom, earlier, it had been forbidden to discriminate against in hiring. The Chamber of Commerce's resolution of that farfetched hypothetical does not, however, follow from the Board's decision in *Sunland*. *Sunland* involved an employer's refusal to hire paid union organizers; accordingly, the Board did not attempt to balance the separate interests that would be implicated by the firing, during a strike, of an incumbent employee on account of his status as a paid union organizer. The Chamber's real argument—that the *Sunland* exception should become the law in all contexts, not just the setting involving applicants during a strike—ignores Congress's grant to the Board of "primary responsibility for developing and applying national labor policy." *Curtin Matheson*, 494 U.S. at 786.

ganizers to their property. In vindicating the property rights of employers, however, the Court in *Lechmere* did not rely on Section 2(3) of the Act, nor did it limit the scope of Section 7's protections of employee union activity. Workers for hire who do not fit within any of Section 2(3)'s specific exemptions are not outsiders, but are employees, and as such are lawfully on the employer's property. Thus, as we note in our opening brief (Br. 27 n.12), the Board's decision is completely consistent with *Lechmere*. See also Pet. App. 36a-37a; Note, *Organizing Worth Its Salt: The Protected Status of Paid Union Organizers*, 108 Harv. L. Rev. at 1348-1350.⁸

* * * * *

⁸ The Chamber of Commerce's claim (Br. 21) that paid union organizers will interfere with Board representation elections is also meritless and, in any event, not presented by this case. As our opening brief points out (Br. 33 n.14), employee status is not synonymous with voting eligibility, and the Board has routinely denied voting rights to paid union organizers who do not intend to remain with the employer. See *Multimatic Products*, 288 N.L.R.B. 1279, 1316 (1988); *299 Lincoln Street, Inc.*, 292 N.L.R.B. 172, 180 (1988), and cases cited therein. While the paid union organizer's "employment would give him a better perch from which to propagandize * * *, [that] would [also] be true for any union zealot who got a job with [the employer]." *Willmar Electric Service, Inc. v. NLRB*, 968 F.2d 1327, 1330 (D.C. Cir. 1992), cert. denied, 113 S. Ct. 1252 (1993). In any event, if an employer believes that the presence of paid union organizers has interfered with an election, the appropriate time to raise that contention is in the certification proceeding (see, e.g., *NLRB v. Savair Mfg. Co.*, 414 U.S. 270, 270-272 (1973)), not in an unfair labor practice proceeding arising out of a discharge or refusal to hire.

For the foregoing reasons and those stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1994

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

TOWN & COUNTRY ELECTRIC, INC., *et al.*,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Eighth Circuit

REPLY BRIEF FOR
INTERNATIONAL BROTHERHOOD
OF ELECTRICAL WORKERS
LOCAL 292

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**REPLY BRIEF FOR
INTERNATIONAL BROTHERHOOD
OF ELECTRICAL WORKERS
LOCAL 292 ***

1. *Overview:* Town & Country's ("T&C's") central contention here is focused on union programs requiring union members who work for a nonunion employer, as a condition of continued good standing membership, to engage in an active union effort to organize the employer's employees (and sometimes providing union remuneration for so doing). T&C argues that such individuals, who concededly are doing "employee" work for "employee" pay (or who are applying for such work), are not "employees" within the meaning of that term in § 2(3) of the National Labor Relations Act, as amended, 29 U.S.C. § 152(c). According to T&C, by instituting such a program the union usurps the rightful control an employer has over an individual who works for the employer as an "employee"; hence, such union-member workers are not NLRA § 2(3) "employees" at all. That being so, T&C maintains, a nonunion employer has *carte blanche* to refuse to hire or, once hired, to terminate, a union-member worker participating in such a program. See Brief For Respondent Town & Country Electric, Inc. ("T&C Br.") at 35-37.

It facilitates analysis of this position to begin with several points that are beyond dispute. First, NLRA § 7, 29 U.S.C. § 157, protects the right to "form, join and assist" labor organizations, which right necessarily includes both the right to be a union member and the right to engage in active union organizing activity. Second, NLRA § 8(a)(3), 29 U.S.C. § 158(a)(3), prohibits employer discrimination based on union membership and on active

* The International Brotherhood of Electrical Workers Local 292 was the Intervenor/Respondent in the court below and is, under Rule 12.4 of the Court's Rules, a party in this Court. This reply brief supports the position being taken by the petitioner and is therefore filed in tandem with the filing of the petitioner's reply brief.

union organizing activity. *Radio Officers v. Labor Board*, 347 U.S. 17 (1954). Third, § 8(b)(1), 29 U.S.C. § 158(b)(1) recognizes that such organizations, through their democratic membership processes, have the authority to establish a wide range of internal rules consistent with public law regulating the conduct of members. *NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175 (1967); *Scofield v. NLRB*, 394 U.S. 423 (1969). In this regard there is no contention here—nor could there be—that union rules establishing an active organizing program, requiring participation in that program as a condition for an exemption from the union prohibition against working under non-union conditions, and providing recompense for such participation violate the NLRA or any other public law.¹

On the face of things, then, T&C's position that a lawful form of union activity negates the protections of the Act designed to protect forming, joining and assisting unions is paradoxical in the extreme. And, as we show in detail later, T&C fails entirely in its one perfunctory effort to establish a predicate for its position in the language and legislative history of NLRA § 2(3) or in the common law of agency.

Indeed, T&C and its *amici* barely make a pretense of treating with the only legal issue here—the meaning of the term “employee” in NLRA § 2(3). Rather, their presentations are a study in realpolitik. Stripped of the

¹ T&C and its *amici* do complain that although management surveillance of, and infiltration into, a union can be an unfair labor practice, there appears to be no symmetrical prohibition upon union “infiltration” of an employer. That is simply untrue. The statute does protect management's ability to carry out its labor relations policy free of all union influence and does so through the assurances of loyalty from *supervisory* and *managerial* employees. See *NLRB v. Bell Aerospace*, 416 U.S. 267 (1974); *American Broadcasting Cos. v. Writers Guild West, Inc.*, 437 U.S. 411 (1978). The Act thus permits an employer to reject as a supervisor or a manager, the union member or union staff person who intends to further union organizing aims. On the other hand, all “employees” are, under the statute, entitled to “form, join and assist” labor organizations, and all employers are banned from denying employment to “employees” who lawfully seek to do so.

embellishments, their point is this: Active construction union organizing programs of the kind that generated this case can, and on occasion have, lead to activity that disrupts the employer's operations and goes beyond the kind of organizing activity protected by NLRA § 7. That being so, nonunion construction employers need an absolute and unqualified right to refuse to hire union members who participate in such programs, or if such a worker is by mischance hired, to fire him on ascertaining his status.²

² Situations in which union-member workers who are involved in an active union organizing program engage in improper unprotected activity on the job (such as intermittent, partial or “sitdown” strike activity, slowdowns, or vandalism) are analytically indistinguishable from situations involving any other union-supporter employee engaging in the same activity. The employer has a general right to run its operations that is untouched by §§ 7, 8(a)(1) & (a)(3) and so long as he is exercising that right, the employer is free to discipline or discharge the wrongdoing worker. See, e.g., *NLRB v. Fansteel Mfg. Co.*, 306 U.S. 140 (1939); *Embossing Printers, Inc.*, 268 NLRB 710, 723 (1984), *enfd mem.*, 742 F.2d 1456 (6th Cir. 1984); *Johns-Manville Prods Corp. v. NLRB*, 557 F.2d 1126 (5th Cir. 1977), *cert. denied*, sub nom. *Oil, Chemical & Atomic Workers v. NLRB*, 436 U.S. 956 (1978); *NLRB v. Marshall Car Wheel Co.*, 218 F.2d 409 (5th Cir. 1955) (walkout intentionally timed when molten iron was about to be poured would have caused serious physical damages to the plant and was therefore unprotected); see generally Hardin, I *Developing Labor Law* (1992), 161-168; II, *The Developing Labor Law* (1992) 1110-1120.

Situations in which employers establish prophylactic rules that disqualify applicants for employment because of a concern that that they will engage in unprotected concerted activity raise more novel questions. So far as we are aware, there is no case law judging an employer rule banning workers who have engaged in improper unprotected activity or workers who are part of a program that has made it a practice to authorize such activity, or workers who the employer on some objective basis believes have a propensity to engage in such activity. It may be that the Board would conclude that such rules, particularly when promulgated by an employer following a “non-union” labor relations policy, are discriminatory in violation of § 8(a)(3) (or violate § 8(a)(1)); that such rules are entirely lawful under the Act; or that such rules can only be judged through a more particularized fact-sensitive set of rules. Be that as it may, the essential point is that these are substantive NLRA questions to be evolved from §§ 7,

Taken on its own terms, this argument relies on a *non sequitur*. The fact—assuming it to be a fact—that *some* construction union member/workers participating in active union organizing programs may go beyond the bounds of the law (or even that *some* programs as a whole may go beyond those bounds) does not entail the conclusion that it is proper to ostracize all construction union members who engage in all such programs. For, by the same hypothesis, the only sin of other union members (and other programs) is the lawful organizing activity that otherwise might not take place and that nonunion contractors do not want to take place.

Beyond that, the conclusion that union-member workers participating in such programs are NLRA § 2(3) “employees” does *not* grant such workers any dispensation whatsoever to engage in any organizing—or any other employment—activity that is *not* protected by the Act (*see* n.2, *supra*), or negate the employer’s authority to enforce neutral rules setting standards of productivity, order, and commitment. *See* Brief for International Brotherhood of Electrical Workers Local 292 (“IBEW Br.”) at 16-17, 42-46.

At bottom, T&C and its *amici* believe that what the Act allows nonunion employers in this regard is not sufficient to balance what the employers regard as an improper dispensation that allows unions to stimulate their members—through union rules and remuneration—to seek employment in nonunion settings with an object of furthering an active union organizing program. According to T&C, the proper means of “correcting” the current “unjust” situation is to impose an artificial limitation on § 2(3)’s employee definition. But, as we noted in our opening Brief, even if “the tactics used here deserve condemnation . . . this would not justify attempting to pour that condemnation into a vessel not designed to hold it.”

8(a)(1) & 8(a)(3) in cases in which the employer in fact has adopted such a rule, not status questions to be evolved from the definition of employee in § 2(3) in cases in which the employer, in fact, had no such rule and acted on a discriminatory basis.

NLRB v. Insurance Agents International Union, 361 U.S. 477, 496 (1960).

2. *T&C’s Factual Premises*: Given their objective, T&C and its *amici curiae* are intent upon litigating a case other than the case actually before the Court. All quote a miscellany of initial and intermediate decisions in NLRB cases that have not reached the Board;³ an article concerning recent construction union organizing strategies based upon surmise and conjecture rather than fact;⁴ a document that purports to reveal union organizing

³ For example, T&C relies on the Report of the NLRB General Counsel, Bureau of National Affairs, *Daily Labor Report* (Nov. 28, 1994) at D-2 to D-3. Brief for Respondent Town & Country Electric, Inc. (“T&C Br.”) at 18-19.

In the case reported upon, however, at the time of the concerted activities in question, *all* the individuals working for the employer were union members, and the opinion does not distinguish between individuals who were union members at hire and individuals who joined the union after being hired. *Id.* at D-2. Moreover, the NLRB General Counsel *declined* to issue a complaint, not because the individuals in question were *not* “employees” but because the employees’ activities were *not* protected by § 7. That case, and its disposition by the General Counsel, therefore cuts against T&C’s position by demonstrating that while, under the NLRB’s decision in this and similar cases, union members who participate in active organizing programs are § 2(3) “employees” under the Act, they, like all employees, are protected from discharge when engaged in union-related activities *only* to the degree their activities are within the range protected by the Act.

⁴ Herbert Northrup, “Salting” the Contractors Labor Force: *Construction Unions Organizing with NLRB Assistance*, XIV *Journal of Labor Research* 469 (1993).

In a recent case heard by an Administrative Law Judge, Herbert Northrup appeared as an expert witness and attempted to demonstrate “that union members who apply for work and who write ‘volunteer union organizer’ or words to that effect on their applications are not bona fide applicants.” *H.B. Zachry Co.*, Nos. 12-CA-14962, 12-CA-14962-2, 12-CA-15018 (1993), ALJ Op. at 23. The ALJ commented on the testimony as follows:

[A] brief analysis of Professor Northrup’s testimony shows the fallacy of Respondent’s position. . . . One of the more interesting facts is that Northrup’s “‘expert opinion’” is based solely on conversations and consultation with employers

strategies, put out by individuals who have no connection whatever with the union in this case, with its international union, or so far as we can ascertain, with any union;⁵ and an international union organizing department pamphlet providing non-binding suggestions to the international's affiliates which the union in this case never adopted.⁶

This none-too-subtle effort to create an identity between construction union organizing programs of the kind that generated this case and wrongdoing by the participating union members rests on an evidentiary basis far too flimsy to support it. And, it is not surprising that the bits and pieces T&C cites are only a small part of the real situation.

There have been far-reaching changes both in the economics of the construction industry and in the applicable legal framework. See *John Deklewa & Sons, Inc.*, 282 NLRB 1375 (1987), *enf'd*, 843 F.2d 770 (3d Cir.

Northrup conceded that he had never interviewed a single employee at any jobsite concerning the Union's "Fight Back Program." Nor has Northrup spoken with any officer or other official of the Union regarding the program. Aside from the obvious potential bias of his expert opinion, Northrup also conceded that he had not done any study as to how much time "volunteer organizers" spend engaging in organizing activities once hired. . . . Using Northrup's own standards leaves little room for doubt that the Union was engaged in a serious organizing effort [ALJ Op. at 22-23.]

⁵ T&C, cites a document called *A Troublemaker's Handbook: How to Fight Back Where You Work—And Win!* no less than five times in its brief. T&C Br. at vi. Yet there is, as far as we are aware, no evidence whatever that this document, prepared by worker activists and directed to *all* employees, not specifically to union members was read by, much less followed by, any discriminatee in this case or adopted by their union.

⁶ IBEW Special Projects Department, *Setting As Protected Activity Under The National Labor Relations Act* (March 1993). While the IBEW and Local 292 are affiliated organizations, each is a separate legal entity and the international's suggestions are not binding on its local unions. See, e.g., *Coronado Coal Co. v. Mine Workers*, 268 U.S. 295 (1925).

(1988).⁷ These changes have caused many construction unions to turn from an organizing approach based on restricting the supply of qualified union member craftspersons who would work for nonunion contractors to induce the employers to sign pre-hire union contracts to the organizing approach followed by industrial unions in organizing industrial employees. See *Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645 (1982); *NLRB v. International Broth. of Elec. Workers*, 481 U.S. 573, 592 (1987). These construction unions have therefore relaxed their rules against their out-of-work members working for nonunion contractors, while requiring or encouraging the members who work on nonunion worksites to engage in on-the-job organizing activity. Pet. App. 46a-47a. Sometimes the unions seek to encourage union members to take such jobs by assuring that the members will not lose union pay or benefits; sometimes there is no such economic "make whole" policy.

Based on the old regime, contractors who are operating nonunion have presumed that their "nonunion" status was a given and would be accepted as a given by construction unions and by their employees. See Pet. App. 61a-62a (T&C assumed, prior to the recent change in union rules, that "the union opposed the hiring of any of its members by a nonunion employer" and that consequently only "union renegades, [who] pose[] no organizational threat", would apply to work for nonunion contractors).⁸

⁷ Under *Deklewa*, unions face the reality that employers signatory to a collective bargaining agreement can at the conclusion of the agreement walk away from a collective bargaining relationship established under § 8(f) of the Act, 29 U.S.C. § 158(f); only if the union affirmatively establishes that a majority of the employees in the pertinent unit have chosen union representation is the union assured that the presumptions of majority support applicable in other industries will prevent employers from "going nonunion" at will. See, e.g., *Brannan Sand & Gravel*, 289 NLRB 977 (1988).

⁸ As the ALJ noted, the fact that many Town & Country employees had union backgrounds is therefore not a demonstration of the employer's willingness to accept union representation, but of the employer's belief that in light of union prohibitions on

Such contractors, including, it appears, T&C in this case, view the organization of their workforce as anathema and those construction unions that are no longer willing to maintain separate "union" and "nonunion" sectors of the industry as sworn enemies. These employers are willing to go to any length not to hire or retain union-member construction craftspersons who might engage in perfectly lawful organizing activity on non-working time and in non-working areas.

For example, in one case, an employee who was *not* a union member prior to going to work for the contractor and who joined the union and became a member of the union's voluntary organizing committee was then discriminated against in recall from layoff because of his "open support for the Union." The ALJ found that "testimony about [the employee's] productivity [failures] was pure fabrication in an attempt to obviate the real [§ 8(a)(3)] reason for not wanting [him] to return to work." *H.B. Zachry Co., supra*, ALJ Op. at 20. Moreover, the same employer, who automatically disqualified *all* applications that included the information that the applicant was a "volunteer union organizer," was, the ALJ found, engaged in a "sham . . . complicated game Respondent has developed . . . to weed out certain applicants while at the same time constructing a defense that Respondent had no knowledge of that applicant's union sentiments." In fact, found the ALJ, the employer rejected eighteen applicants from union members summarily "because of [the applicants'] union affiliation" and not for any other reason. *Id.* at 29.

Another recent case involved a "union 'salting program' that permits union members to work for non-union employers with permission from the business manager," for the purpose, among others, of having its members "provide information about unions to non-union workers." *Tulatin Electric*, No. 35-CA-7099 (1995) (ALJ Opinion).

working nonunion "competent [formerly union] electricians could be added to its payroll with little risk that ardent union members would be among those hired." Pet. App. 62a.

The union members participating in the program are admonished to "work as hard for a non-union contractor as they would for a union contractor," to "try to make a favorable impression" and, in particular, *not* to engage in "sabotage . . . lying, stealing, cheating, obtaining information unlawfully, usurp[ing] corporate opportunity . . . [or] mak[ing] any assumption that nonunion employees or former union employees are less competent than union members". *Id.*

The ALJ noted that the owner of the respondent company was "deeply hostile toward the Union . . . referring to Local 48 as organized crime trying to put him out of business" and told his superintendent "to eliminate wherever possible any personnel that were affiliated with the Union"; told his employees that "'as long as he owned the Company it would never be union'"; and instituted a no-"moonlighting" policy for the specific purpose of eliminating "salts". The ALJ concluded that "Respondent's union animus is . . . pervasive and the nature of the unfair labor practices . . . egregious, striking at the very heart of the Act. . . Respondent[s] . . . conduct was directed against any applicant that had either worked for a unionized employer or that it suspected of having ever had a union connection." *Id.* at 2-3, 6-7;⁹ *see also Hogan*

⁹ T&C's amici repeatedly characterize as "blackmail" the unions' recognition that given the antiunion animus of many nonunion construction industry employers, it is likely that the employers will refuse, illegally, to hire avowed union adherents, and that filing of unfair labor practices may be necessary to enforce the law. Brief of Amicus Curiae Associated General Contractors of America ("AGC Br.") at 14, 16, 22; Brief of Amicus Curiae Associated Builders and Contractors, Inc. ("ABC Br.") at 13. Apparently, the employers' preferred union response to labor law violations is simply to permit the violations to continue. That the unions instead act on the recognition that, like other lawbreakers, nonunion contractors operating in violation of the NLRA are unlikely to change their ways absent union recourse to the legal system is hardly the practice of "blackmail". *See Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975) (deterrence as one reason for backpay remedy under Title VII, 42 U.S.C. § 2000e(f)); *McKennon v. Nashville Banner Pub. Co.*, 115 S. Ct. 879 (1995).

Masonry, 314 NLRB No. 59 (1994) (union member fired after employer informed that the member would engage in organizing activity “consistent with his obligation as your employee, and as protected by the [Act]”).

In this case as well the facts as found by the ALJ, and affirmed by the Board, demonstrate that T&C was practicing union discrimination pure and simple. The employment applications of the union members were, as far as appears, entirely truthful and accurate; the employer had no knowledge of the “salting resolution” on which it now so heavily relies; the bulk of the discriminatees were out-of-work union members, who, there is every reason to believe, would have gone to work and worked productively if hired (as the one union member hired, Hansen, actually did).

Not surprisingly, the ALJ emphatically found that Town & Country discriminated against the individual applicants because of their evident union backgrounds and against Hansen because of overt union organizing activity. Pet. App. 61a, 67a, 68a, 100a, 113a, 121a.¹⁰ In particular, the ALJ rejected as “a composite of lies” the suggestion that Hansen was, intentionally or otherwise, “a poor worker who failed to meet productivity standards and who failed to perform in a craftsmenlike manner.” Pet. App. 110a; *see also* 113a (expressly disbelieving the employer’s position that Hansen engaged in “deliberat[e] . . . sabotage”).

3. *Statutory “Employees” and Union Relationships:* On the actual facts of this case, then, as properly found by the Board, T&C was engaged in precisely the “embargo against employment of union labor . . . the removal of [which] was the driving force behind the enactment of the National Labor Relations Act,” (*Phelps Dodge v. NLRB*, 313 U.S. 177, 186 (1941)), and nothing more.¹¹ T&C

¹⁰ Much of T&C’s factual account in its brief relies on facts and interpretations of facts specifically rejected by the Board, affirming the ALJ. Pet. App. 20a, 22a.

¹¹ *Phelps Dodge* holds—stating matters as precisely as we can—that individuals who, if hired, would be statutory “employees” are

nonetheless maintains that “discriminatory motive is immaterial” (T&C Br. at 36), because the relationship between the union and the discriminatees in this case is such that the discriminatees are not NLRA § 2(3) “employees” protected by the statute.

T&C’s line of argument is that under established common law agency principles, the union in a situation such as this one exclusively controls a union member’s activities while the member works for the employer, so that the working relationship with the employer is not an “employment” relationship. T&C Br. at 15; *see also, e.g., id.* at 35 (distinguishing “zealous Union supporters who, of their own free will, supported the Union” from individuals “contractually committed to the exclusive service to the Union”), *id.* at 34 (“[t]he salted organizer is required by the organizer’s paramount contractual commitments to the Union imposed by the salting resolution to give precedence to the interests of the Union. . . .”)

Specifically T&C, while acknowledging that under the common law “a person may be the servant of two masters, not joint employers, at one time as to one act, if the service to one does not involve abandonment of the service to another” (Restatement (Second) Agency § 226 (1958) (“Rest.”); *see* T&C Br. at 12), maintains that the circumstances here come within the part of the Restatement section comments noting that maintenance of “the control which a master can properly exercise over the conduct of the servant” may serve to “prevent simul-

protected from discrimination in hiring by § 8(a)(3) and can be afforded backpay and reinstatement in the job under § 10. *Phelps Dodge* rests on the language of § 8(3), now § 8(a)(3), 29 U.S.C. § 158(a)(3), protecting against discrimination in “hire”, read against the historical background of the statute. 313 U.S. at 186-87. And, *Phelps Dodge* reads § 10(c) of the Act, 29 U.S.C. § 160(c), as permitting the Board to order applicant discriminatees hired because § 10(c) speaks broadly of ordering “such affirmative action . . . as will effectuate the policies of this Act”. 313 U.S. at 189 (emphasis supplied). *Phelps Dodge* therefore does not, as one amici would have it (AGC Br. at 6) import into the § 2(3) “employee” definition a provision covering applicants for employment not expressly found there.

taneous service for two independent persons." Rest. § 226, cmt. a.

To establish its position, T&C relies primarily upon the so-called "salting" resolution, and quite secondarily upon the fact that the discriminatees were, or would be, or might be, paid by the union while working for the employer. See, T&C Br. at 16-20, 34; e.g., *id.* at 20 ("control imposed on the salted organizers herein by the fear of discipline for violating the salting resolution"). Thus, there has been a mighty shift from the initial formulation of T&C's argument that it is the cash nexus between the union and its members and/or paid union staff persons seeking work with contractors pursuant to a union organizing program that is the hallmark of their non-"employee" status. That shift is both understandable since the receipt of remuneration for advancing union interests could not possibly be sufficient alone to divest individuals of "employee" status (see IBEW Br. at 47-49), and revealing of the true breadth of T&C's argument.

(i) *The Exclusive Control Contention*: It is telling that T&C never quotes the "salting resolution." Rather, T&C's Brief (at 16-17) demonizes that resolution as one providing that "the salted organizers were only permitted to work for the nonsignatory employer if their sole purpose was furthering the Union's organizing effort" and stating that "the Union has primary control over everything the salted organizers do during the course of their work day." See also, e.g., T&C Br. at 26, 34.

In fact, although the term "sole purpose" appears in quotation marks in T&C's Brief (at 17 n.16), the phrase appears nowhere in the Union's resolutions. Instead, the resolutions only state that members can be authorized "to seek employment by nonsignatory contractors for the purpose of organizing the unorganized." J.A. 256, 257. And, nothing in the resolutions indicate *any* union concern with or control over the manner in which work for the employer is performed, much less an assertion of "primary control over everything the salted organizers do during the work day." T&C Br. at 17. An "obligation

promptly and diligently [to] carry out organizing assignment" is the *only* specific obligation placed by the resolutions upon union members. That obligation hardly suggests "pervasive" and "paramount" union control over the assignment or carrying out of ordinary worksite tasks or indicates any intention to require organizing assignments to be carried out on *working* time.

Consistent with all this, the Board found that Hansen, while employed, performed productive work for T&C, under the employer's direction, and was paid for doing so. Nothing in the record indicates that the Union directed Hansen as to which electrical wires to install when, or which tools to use, or what productivity standards to meet, or how to install the wires, or what hours to work, or what safety precautions to take, or asserted the authority to do so. Rather, the Union intended that Hansen do precisely what the Board found that he did do: Work productively for the employer, under the exclusive direction of the employer's supervisors, during all working hours, and attempt on *nonworking* hours to interest his fellow employees in union representation.

This case, then, is one in which the discriminatees *were* (or would have been if hired) "subject to the directions" of T&C. Rest. § 1 cmt. b (quoted in T&C Br. at 11) with respect to its electrical business. The obligation the discriminatees had to the Union in no way interfered with, much less precluded the exercise of, the "control [T&C] can properly exercise over the conduct of the servant" (Rest. § 226 cmt. a). The situation here has nothing to do with the single situation T&C posits as precluding an "employee" finding; *viz.*, the situation in which an individual is *precluded* by an obligation to one employer from carrying out the tasks assigned by a second employer during the same time period (as would be the case, for example, if an electrician purported to work for two electrical contractors during the same hours, when each of the contractors worked at a different location and each directed that the electrician be present at its location, working on tasks it assigns, for those hours). Rest. § 226 cmt. a.

Having said that, it may be that T&C's submission is narrower than we have allowed and is limited to the assertion that the Union has claimed full control regarding whether union member workers engage in organizing activity during non-working time, and by so doing has deprived the employer of its power to control the employee and to direct him *not* to engage in such organizing activity. But *under the NLRA, employers have no right to issue directions to their employees with respect to union beliefs, union adherence or union activity conducted on non-working time.* As to those matters, the fact that a union member exclusively forwards a union interest rather than the nonunion employer's interest cannot detract from his/her § 2(3) "employee" status. And, that is true whether the member does so "voluntarily," pursuant to a union rule or in return for union pay.

We therefore return to the crux of our opening Brief. The work relationship between T&C and Hansen was assuredly such that had T&C maintained that Hansen was, for Internal Revenue Code purposes, not an "employee" although he performed productive electrical work on its jobsite under its direction for pay, T&C could not have prevailed.¹² Since the *same* standard for assessing "employee" status applies under the NLRA as under the tax laws (as well as under the tort law and most federal statutes, *see Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 322-24 (1992)), it follows that the individual discriminatees in this case are "employees" under the NLRA.¹³

¹² In fact, Town & Country *did* pay employment taxes for Hansen. J.A. 201.

¹³ Under the common law "employee" analysis, as we discussed at length in our opening Brief (at 34, 36-38), the standards governing employee *status* and those which determine the duties of loyalty an individual having that status owes the employer are entirely distinct. At some points, T&C, like the Eighth Circuit, ignores the distinction entirely. T&C Br. at 14 n.15 (quoting from treatises discussing duty rather than status issues); *id.* at 41-43

(ii) The *NLRA and Union Discipline*: Even viewed within the context of the NLRA standing alone, the notion that union members who are subject to internal union rules with regard to participation in concerted union activity while working thereby lose their status as NLRA "employees" would make a mockery of the § 7 *protection* accorded employees "to form, join, and assist labor organizations."

The "control" the union exercises over a union member pursuant to a salting resolution is the "control" to which union members generally subject themselves by voluntarily joining a union that establishes and enforces union rules. Just as a "salting resolution" may require union-member employees to abide by union rules, union constitutions and bylaws frequently require member-employees to join a strike (which, of course, is *intended* to harm the employer's economic interest, and which involves a member-employee commitment to leave work upon the collective decision of the employees, through the union). *See NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 181 (1967).

Employees who do not wish to follow union rules—whether salting resolutions or strike solidarity requirements contained in union constitutions—are *entirely free* to refuse to join the union and *entirely free* to resign at any point. *NLRB v. General Motors Corp.*, 373 U.S. 734 (1963); *Pattern Makers' League of North America v.*

(discussing conflict of interest situations as if they determine the employee status question).

Some of the examples T&C uses (at 41-43) are illustrative of the confusion between status issues and duties of loyalty which has permeated this litigation. For example, while an employer violates the NLRA by placing an "agent" within the union representing its employees as a clerk or data processor, assigned to surreptitiously gather information while carrying out assigned tasks, we would assume that as long as the union in fact assigns the daily clerical tasks and determines how they are to be performed the "employer agent" is still, for common law purposes, the union's "employee" insofar as he/she is carrying out work for the union.

NLRB, 473 U.S. 95 (1985). If the employee does so, "the union has no more control over the former member than it has over the man in the street." *NLRB v. Granite State Jt. Bd., Textile Workers Local 1029*, 409 U.S. 213, 217 (1972).

Thus, the "control" that a union has over a union member is the authority to require that *if, and as long as*, the individual wishes to remain a member, the individual must abide by union rules; if the individual comes to the conclusion while working for a nonunion employer that "the employees would be better off without the union" (T&C Br. at 18), he/she is free to retain employment, resign from the union, and cease any and all union organizing activity. *Pattern Makers*, 473 U.S. at 100-107.

T&C, however, would have it that an employee who voluntarily joins a union (and thereby agrees to abide by union rules) becomes an "agent" of the union for as long as she maintains her membership, and thus stands in the union's shoes rather than her own when engaged in otherwise-protected § 7 activity. Because "the NLRA confers rights only on employees, not on unions or their nonemployee organizers" (*Lechmere, Inc. v. NLRB*, 502 U.S. 527, 532-33 (1992)), the argument goes, an "employee" loses her status as such, and the protection of § 7, by joining a labor union that has adopted the kind of active organizing program at issue here.

This approach, if accepted, would force the individual union member to a Hobson's choice: She must either remain a union member and follow a union rule (for example, to go on strike when the union membership votes to do so), with the result that her conduct is no longer protected by § 7 because she is then acting as the "agent" of the union rather than as an "employee"; or resign from the union in order to maintain her § 7 protections. Section 7, however, protects the right of employees both to engage in "*concerted*" activity (emphasis supplied), and to "form, join, and assist labor organizations", not the right to act solely as an isolated individual or to form

formless organizations without rules. As this Court explained in *NLRB v. Allis-Chalmers Mfg. Co.*, *supra*, holding that unions may discipline union members who cross picket lines during an authorized strike, the union's authority to enforce its rules is derived from the individual's right to choose to form a union and to engage in concerted action through the union:

National labor policy has been built on the premise that by pooling their economic strength and acting through a labor organization freely chosen by the majority, the employees of an appropriate unit have the most effective means of bargaining for improvements in wages, hours and working conditions. . . . *Integral to this federal labor policy has been the power in the chosen union to protect against erosion of its status under that policy through reasonable discipline of members who violate rules and regulations governing membership.* [388 U.S. at 180-81 (emphasis supplied)]

See also *NLRB v. City Disposal Systems, Inc.*, 465 U.S. 822, 833 (1984) ("the formation of a labor organization is integrally related to the activity of joining or assisting such an organization . . . neither the individual activity nor the group activity would be complete without the other.")

It would reduce the Act to nonsense to say that the right of individual employees to join together in unions, and the derivative right of those unions to adopt and enforce reasonable and lawful rules of conduct, leads to the conclusion that the members thereby lose their status as "employees" and the protections of § 7.

4. *Additional Arguments*: We conclude by responding to three final arguments that are raised by T&C and its amici.

First, T&C argues that *Lechmere, Inc. v. NLRB*, *supra*, which holds that employers can invoke their property right to exclude "*nonemployee* union organizers" from their property, cuts against the proposition that the discriminatees in this case are statutory "employees." But

Lechmere states one side of a dichotomy. *Republic Aviation, supra*, which holds that employers cannot invoke their property rights against employee-organizers, states the other. And, state property laws do not control the determination of which individuals are "employees" and which are "nonemployees." It is the NLRA that controls this determination and it is the NLRA that in turn controls whether the *Lechmere* rule or the *Republic Aviation* rule applies. The rules announced in *Lechmere* and *Republic Aviation*, moreover, do *not* depend upon the nature of the relationship between the union and the nonemployee organizer. A nonemployee organizer without *any* formal relationship with a union seeking to hand out union literature, can be excluded from an employer's property just as readily as a union staff organizer. But that individual if hired by the employer most certainly is protected by § 7 in engaging in the same act in a nonworking area on nonworking time.

Second, T&C and its amici maintain that a literal reading of §§ 2(2) and 2(3) of the NLRA, 29 U.S.C. §§ 152(2) & (3), yields the result for which they argue. T&C Br. at 39; AGC Br. at 9; "Ch. Com. Br." at 22. The contention is that because "any labor organization (other than when acting as an employer)" is not an "employer" under § 2(2), and because § 2(3) states that in the NLRA employee class "any individual employed . . . by any other person who is not an employer as defined herein," individuals who are employees both of a labor organization and of a § 2(2) employer are not statutory "employees." This argument is doubly flawed.

To begin, even assuming that there is an employment relationship between the individual in question and a labor organization (as there need not be under T&C's new "control" argument), it is a strange form of literalism that concludes that while a labor organization *is* an employer "when acting as an employer," individuals employed by labor organizations are employed by a "person who is not an employer as herein defined." Literally speaking, rather, the statute makes clear that an employment rela-

tionship with a union is to be treated *no* differently from any other employment relationship under the Act. Since it is that very employment relationship upon which respondents rely (in part), a plain reading of the statute supports rather than detracts from the conclusion that the individuals are statutory "employees".

There is, moreover, the consideration that §§ 2(2) and 2(3) taken together cannot sensibly be read so as to exclude as an "employee" any individual employed by an employer not covered by the Act, even if that individual is *also* employed by a statutory employer. Such a construction would create a large realm of individuals excluded from the Act's coverage because of multiple employment; individuals who are railroad, airline, or agricultural employees, for example, would lose NLRA protection if also employed by an NLRA employer. "[T]his is a bit of verbal logic from which the meaning of things has evaporated." *Phelps Dodge, supra*, 313 U.S. at 101.

Obviously, the statutory definitions were not intended to interact in this exclusionary way. Rather, the only sensible construction of the Act is that each employment relationship is to be viewed discretely to determine whether, by virtue of *that* relationship, the individual was entitled to NLRA protection; if so, the existence of another relationship not covered by the Act is irrelevant.

Third, T&C and its amici make much of the fact that the NLRB, in *Sunland Construction Co.*, 309 NLRB 1224 (1992), concluded that employers do *not* violate the NLRA by refusing to hire paid union officials to work behind picket lines during a strike. T&C Br. at 43; Ch. Comm. Br. at 14; AGC Br. at 27; ABC Br. at 12. Whether or not the Board's *Sunland* decision is sound is beside the point here.

In *Sunland*, as here, the Board determined that the individual discriminatee *was* a statutory employee". 309 NLRB at 1226. It is this consistent Board rule that the Eighth Circuit overturned in this case and that is here at issue. How the statute's substantive provisions then apply in a myriad of possible discrete situations involving var-

ious considerations raises a series of second level substantive questions not presented by this case in its present posture. *See* n.2, *supra*.

In particular, the Board's holding regarding the strike situation in *Sunland* is of a piece with a body of Board law that elaborates a series of tailored rules regarding employer operations during the special situation of a strike. For example, despite the statutory obligation to bargain collectively with the exclusive representative of employees, "it is well settled that struck employers have no obligation to bargain about employment terms for replacements during the course of an economic strike." *GHR Energy Corp.*, 294 NLRB 1011, 1012 (1989); *Goldsmith Motors Corp.*, 310 NLRB 1279, 1279 (1993) (same). This Court in *NLRB v. Curtin Matheson Scientific, Inc.*, 494 U.S. 775, 792 (1990), expressly noted this line of cases and expressly recognized that because the strike situation is unique, the Board may make unique rules to cover it. For the same reason, the Board's decision here and its decision in *Sunland* on the reach of §§ 8(a)(1) & (a)(3) are in no way "irreconcilable" (*Curtin Matheson*, *id.* at 792).

CONCLUSION

For the reasons stated above and in our opening Brief, the judgment below should be reversed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

NATIONAL LABOR RELATIONS BOARD,

Petitioner

v.

TOWN & COUNTRY ELECTRIC, INC.

and

AMERISTAFF PERSONNEL CONTRACTORS, LTD.

Respondents

On Writ of Certiorari to the
United States Court of Appeals for
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BRIEF OF AMICUS CURIAE
INTERNATIONAL BROTHERHOOD OF
BOILERMAKERS, IRON SHIP BUILDERS,
BLACKSMITHS, FORGERS AND HELPERS,
AFL-CIO, CFL,
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STATUTORY PROVISIONS

29 U.S.C. §151: The denial by some employers of the right of employees to organize and the refusal by some employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce by (a) impairing the efficiency, safety, or operation of the instrumentalities of commerce; (b) occurring in the current of commerce; (c) materially affecting, restraining, or controlling the flow of raw materials or manufactured or processed goods from or into the channel of commerce, or the prices of such materials or goods in commerce; or (d) causing diminution of employment and wages in such volume as substantially to impair or disrupt the market for goods flowing from or into the channels of commerce.

The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries.

Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial

strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees.

Experience has further demonstrated that certain practices by some labor organizations, their officers, and members have the intent or the necessary effect of burdening or obstructing commerce by preventing the free flow of goods in such commerce through strikes and other forms of industrial unrest or through concerted activities which impair the interest of the public in the free flow of such commerce. The elimination of such practices is a necessary condition to the assurance of the rights herein guaranteed.

It is declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1994

NATIONAL LABOR RELATIONS BOARD,
PETITIONER

V.

TOWN & COUNTRY ELECTRIC, INC.

AND

AMERISTAFF PERSONNEL CONTRACTORS, LTD.

On Petition for Writ of Certiorari to the
United States Court of Appeals for
the Eighth Circuit

BRIEF OF AMICUS CURIAE
INTERNATIONAL BROTHERHOOD OF BOILERMAKERS,
IRON SHIP BUILDERS, BLACKSMITHS, FORGERS
AND HELPERS, AFL-CIO, CFL,
IN SUPPORT OF PETITIONER

I. INTEREST OF AMICUS CURIAE

The International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers & Helpers, AFL-CIO, CFL ("Boilermakers"), submits this brief, as *amicus curiae*, in support of the Petitioner, National Labor Relations Board ("NLRB"). All parties have given written consent for the Boilermakers to appear as *amicus curiae* in this matter.

The issue before this Court is whether a paid union organizer, applying for or holding a job with an employer he intends to organize, is an "employee" within the meaning of §2(3) of the National Labor Relations Act ("NLRA" or "the Act"), 29 U.S.C. §152(3), and therefore protected from discrimination because of his union activity or affiliation. While this is an issue of vital importance to all of organized labor, the Boilermakers International has a particular interest in this question, distinct from that of the other parties to this litigation, because of its organizing program.

The Boilermakers, with a membership of approximately 80,000, represent employees in a variety of industries, including construction, shipbuilding, cement, forging, mining and manufacturing. The Boilermakers International employs a twenty-two person staff assigned to organize employees in all industries falling within its craft jurisdiction. These organizers often attempt to join the work force of the employers they intend to organize.

For the past fifteen years, the Boilermakers International has been engaged in a program, known as "Fight Back," to organize workers in the construction

industry. The Boilermakers have filed a number of election petitions seeking to represent employees in the construction industry. See, e.g., *Foster Wheeler Constructors, Inc.*, 4-RC-17073; *McDermott International, et al.*, 15-RC-7606; *Process Mechanical, Inc.*, 1-RC-19275; *Qualified Personnel, Inc.*, 5-RC-12901; *Advance Tank, Inc.*, 10-RC-13360; *Harbert, Inc.*, 12-RC-7200; *The Industrial Company*, 18-RC-15368; *U.S. Boiler & Tube Co., Inc./U.S.B.T. Abrasives & Refractories*, 10-RC-14310; *Foster Wheeler Constructors, Inc.*, 11-RC-5939.

The Boilermakers International has filed unfair labor practice charges with the NLRB where an employer's response to organizing efforts has been to unlawfully discriminate against applicants or current employees. See, e.g., *H.B. Zachry Co.*, 289 N.L.R.B. 838 (1988), enforcement denied, 886 F.2d 70 (4th Cir. 1989); *Fluor Daniel, Inc.*, 304 N.L.R.B. 970 (1991), enforced mem., 976 F.2d 744, reh'g denied, 980 F.2d 1449 (11th Cir. 1992); *Sunland Construction Co., Inc.*, 309 N.L.R.B. 1224 (1992); *Ultrasystems Western Constructors, Inc.*, 310 N.L.R.B. 545 (1993), enforced in part, remanded in part, 18 F.3d 251 (4th Cir. 1994); *Sunland Construction Co., Inc.*, 311 N.L.R.B. 685 (1993); *Fluor Daniel, Inc.*, 311 N.L.R.B. 498 (1993). Four of these decisions involve the protection to be accorded paid organizers. In *H.B. Zachry Co. v. NLRB*, 886 F.2d 70 (4th Cir. 1989), the United States Court of Appeals for the Fourth Circuit, in disagreement with the NLRB, ruled that paid organizers are not "employees," entitled to the protection of the Act. The Fourth Circuit's decision in *Zachry* is cited by the Eighth Circuit as support for its decision in the instant case. *Town & Country Electric, Inc. v. NLRB*, 34 F.3d 625, 628 (8th Cir.

1994). The Fourth Circuit declined to reverse *Zachry* in *Ultrasystems Western Constructors, Inc. v. NLRB*, 18 F.3d 251 (4th Cir. 1994). Both *Zachry* and *Ultrasystems* involved paid organizers from the Boilermakers.

The two cited Sunland Construction Company cases were companion cases with *Town & Country* before the NLRB, and the Boilermakers participated in the oral argument before the NLRB concerning this issue. The decision in *Sunland Construction Co., Inc.*, 309 N.L.R.B. 1224 (1992) was issued at the same time as the NLRB's decision in this case.¹

The Boilermakers' Fight Back program shares some similarities with the organizing efforts portrayed in this case. As noted above, the Boilermakers utilize paid staff organizers. Like the International Brotherhood of Electrical Workers ("IBEW"), the Boilermakers involve rank-and-file union members by encouraging them to accept work with nonunion contractors and asking those members to assist, within the confines of the law, in the organizing process.

There are also significant differences between Fight Back and the IBEW efforts. Only Boilermakers' staff organizers receive compensation for their efforts. The

¹While each party sought review of the NLRB's decision, the Boilermakers and Sunland subsequently entered into a settlement agreement whereby Sunland extended voluntary recognition to the Boilermakers. The parties further entered into three collective bargaining agreements under which Sunland is currently performing work. See *Sunland Signs Union Contracts, Boilermakers Drop ULP Charges*, Daily Labor Report, Sept. 20, 1994, at A-6.

Boilermakers do not make up the difference between union scale and non-union wages for those rank and file members who agree to work for nonunion contractors. Compare *Town & Country v. NLRB*, 34 F.3d at 629 with *Sunland Construction Co., Inc.*, 311 N.L.R.B. 685, 689-94, 697-98, 700-03 (1993). Hence, those union members who agree to assist the Boilermakers in organizing do so strictly as volunteers. In addition, the Boilermakers do not utilize any type of "salting resolution." Compare *Town & Country* with *Sunland*.

II. SUMMARY OF ARGUMENT

The Board has consistently interpreted §2(3) to include paid organizers. *Town & Country*, 309 N.L.R.B. 1250, 1255, n.25 (1992). The Eighth Circuit's rejection of the Board's interpretation flies in the face of the clear statutory language of §2(3), the legislative history of the Act, as well as settled principles of statutory interpretation and deference to agency expertise. The Boilermakers anticipate that these matters will be covered in some detail in the principal briefs submitted to the Court. The focus of the Boilermakers' argument is on the major policy reasons why the Court should reject the Eighth Circuit's analysis and find paid organizers to be protected employees under the Act.

The Eighth Circuit's decision fundamentally rests on a motive-based analysis of who is an "employee" deserving of protection under the Act. According to the lower court, paid organizers are entitled to no sanctuary under the Act, even though they engage in the same concerted activity as volunteer organizers. This artificial distinction lacks any basis in either the

language or purpose of the NLRA, which protects organizing activities without regard to motive. The uncertainties created by such a motive-based analysis would be impermissibly destructive of concerted activity sanctioned by the Act. The decision also rests on the improper assumption that employees engaging in organizing activity are "disloyal" to their employers and are, therefore, unprotected. The decision further improperly attempts to invoke the common law of master-servant to find paid organizers outside the statutory definition of protected employees and, even then, misconstrues that common law.

III. THE EIGHTH CIRCUIT'S ANALYSIS INCORRECTLY RESTS ON THE MOTIVE UNDERLYING THE ORGANIZER'S ACTIVITY

The NLRA extends protection to the overt act of organizing. The Eighth Circuit's analysis undermines this protection by improperly delving into the motives underlying the paid organizer's activity.² As will be shown, a motive-based test for protecting concerted activity would effectively destroy that statutory shield. To appreciate the fallacy and the danger of this approach it is important to recall the Congressional purpose behind enactment of the statute.

In adopting the Act sixty years ago, Congress chose to protect the rights of

²As shall be seen, without any evidence, the Eighth Circuit speculates as to various nefarious motives supposedly held by the discriminatees in this case, as well as paid organizers in general. These matters are addressed *infra.*, at pp. 23-24. The focus here is the theoretical underpinnings of the lower court's decision.

working people to engage in "concerted activities," including organizing and collective bargaining, as a means of providing them at least some measure of economic leverage in dealing with their employers. 29 U.S.C. §157; *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 33 (1937) (unions are "essential to give laborers opportunity to deal on an equality with their employer"). Congress recognized that workers and, in turn, the country as a whole would benefit from legislation fostering decent wage rates, establishment of pension and other fringe benefits, and humane working conditions. 29 U.S.C. §151. See also *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 182 (1941) ("Protection of the workers' right to self-organization does not curtail the appropriate sphere of managerial freedom; it furthers the wholesome conduct of business enterprise."). This broad public policy undergirds many of the social reform measures passed in the wake of the Great Depression. See, e.g., Fair Labor Standards Act, 29 U.S.C. §201 et seq., finding regulation of minimum wage, overtime and child labor necessary to correct "labor conditions detrimental to the maintenance of the minimum standards of living necessary for health, efficiency, and general well-being of workers. . . ."; Social Security Act, 42 U.S.C. §301, et seq., as discussed in *Mathews v. De Castro*, 429 U.S. 181, 185-87 (1976).

Legislative protection for organizing and collective bargaining was aimed specifically at assisting workers in achieving some of these ends through their own efforts in an economy ever more dominated by powerful and often oligarchical corporate employers. Indeed, this is explicitly recited as a Congressional finding justifying passage of the NLRA. 29 U.S.C. §151. More recently,

Congress affirmed its view that protection of organizing and collective bargaining remains an efficacious antidote for the social ills of disproportionately low wages, poor working conditions and labor unrest by extending NLRA coverage to not-for-profit hospitals. *Beth Israel Hospital v. NLRB*, 437 U.S. 483, 497-98 (1978) ("Congress determined that the extension of organizational and collective-bargaining rights would ameliorate these conditions and elevate the standard of patient care.").

As the Board stated in this case, "[t]he right to organize is at the core of the purpose for which the statute was enacted." *Town & Country*, 309 N.L.R.B. at 1256. See *American Hospital Ass'n v. NLRB*, 499 U.S. 606, 609 (1991) ("[t]he central purpose of the Act was to protect and facilitate employees' opportunity to organize unions to represent them in collective bargaining negotiations"); *Sears, Roebuck & Co. v. San Diego County Dist. Council of Carpenters*, 436 U.S. 180, 206 n.42 (1978) ("the right to organize is at the very core of the purpose for which the [Act] was enacted"); *Phelps Dodge Corp.*, 313 U.S. at 194.

In the NLRA, Congress chose to shield the workers' right to organize both with affirmative protections afforded those engaging in such activity, see, 29 U.S.C. § 157, and with negative prohibitions on employers requiring they refrain from discriminating against anyone who would so act, see 29 U.S.C. §158(a)(3). A refusal to hire based upon an employee's organizing activity violates §8(a)(3). *Fluor Daniel, Inc.*, 304 N.L.R.B. 970 (1991), enforced mem., 976 F.2d 744, reh'g denied, 980 F.2d 1449 (11th Cir. 1992). This is true whether an individual's organizing activities have been

directed at fellow employees or at workers employed by other employers. Compare *Fluor Daniel, Inc.*, 304 N.L.R.B. 970 (1991), enforced mem., 976 F.2d 744 reh'g denied, 980 F.2d 1449 (11th Cir. 1992) with *Prince Lithograph Co., Inc.*, 171 N.L.R.B. 1385 (1968), enforced, 405 F.2d 175 (4th Cir. 1969). Current employees are protected from discharge when they engage in organizing activities. *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945); *Ciro Resorts, Inc.*, 244 N.L.R.B. 880 (1979), enforced, 646 F.2d 403 (9th Cir. 1981). Applicants may not be rejected nor current employees treated differently on the ground that they are likely to be union supporters. *Scherrer & Davisson Logging Co.*, 108 N.L.R.B. 357 (1954), enforced 221 F.2d 802 (9th Cir. 1955); *Lipsey, Inc.*, 172 N.L.R.B. 1535 (1968); *National Fabricators, Inc.*, 295 N.L.R.B. 1095 (1989), enforced, 903 F.2d 396 (5th Cir. 1990), cert. denied, 498 U.S. 1024 (1991) (selection of union members for layoff because they would be more likely to honor a picket line is "inherently destructive" of employee rights). The legislative focal point bore on shielding overt actions, defined to include organizing, collective bargaining, and other concerted activity, without regard for the actor's subjective reasons for engaging in that conduct. Neither the NLRA as passed in its original form in 1935 nor as amended by the Taft-Hartley Act in 1947 circumscribed or denied these protections based on a person's motivation for undertaking otherwise lawful concerted activity.

Yet, this is precisely the basis upon which the Eighth and Fourth Circuits find paid organizers to be unprotected under the Act. Both the Eighth and the Fourth Circuits hold that nonunion employers can, with

impunity, reject job applications from self-acknowledged organizers who receive some measure of financial support from their unions and who would, if hired, engage in organizing activity of the type protected under the Act. *Town & Country Elec., Inc. v. NLRB*, 34 F.3d at 628-29; *H.B. Zachry Co. v. NLRB*, 886 F.2d at 75-76. At the same time, those lower courts grudgingly acknowledge that a person undertaking exactly the same organizing activities would be fully protected, so long as he receives no financial support from a union. *Town & Country*, 34 F.3d at 629; *H.B. Zachry*, 886 F.2d at 75.

In this case, two full-time paid organizers applied to and, had jobs been offered, would have gone to work for Town & Country. Nothing in the evidence suggests they would have performed the work assigned them by Town & Country in anything other than a competent, professional manner. The record is clear that they would have been expected to devote much of their nonwork time to lawful organizing efforts among Town & Country's other employees. *Town & Country*, 309 N.L.R.B. at 1251, 1256. Presumably, they would have returned to their organizing positions with the union at the conclusion of the project.¹

In addition to these two union officials, several rank-and-file IBEW members applied for work with Town & Country. All were

¹Town & Country is a nonunion construction contractor. Because most construction jobs are of short duration, workers in this industry typically face sporadic employment with multiple employers. *John Deklewa & Sons*, 282 N.L.R.B. 1375, 1380 (1987), enforced, 843 F.2d 770 (3d Cir.), cert. denied, 488 U.S. 889 (1988).

ready, willing and qualified to fill the openings available. *Town & Country*, 309 N.L.R.B. at 1262-63. These applicants would have received the difference between union-scale wages and *Town & Country's* nonunion wages from the union had they been hired. In turn, they were expected to undertake lawful organizing during their nonwork time. *Town & Country*, 309 N.L.R.B. at 1251. Malcolm Hansen, the only such applicant hired, was promptly discharged after he began organizing efforts.

The Eighth Circuit held that none of these persons was an "employee" entitled to sanctuary under the NLRA. *Town & Country*, 34 F.3d at 629. In a nutshell, the lower court reasoned that "the organizers wanted to enter *Town & Country's* work force not for financial gain, but to organize its workers" and this distinguished them from "typical applicants" for purposes of the Act. *Id.* at 628-29. See also *H.B. Zachry Co.*, 886 F.2d at 74 ("[union organizer] Edwards' interest in applying to Zachry for employment was qualitatively different from that of a bona fide applicant").⁴ The Eighth Circuit suggests the paid organizers and the applicants who would have had their wages subsidized if hired failed to qualify as "employees" because they would have increased their organizing efforts or even quit if the union told them to do so. *Town & Country*, 34 F.3d at 629 (an employer "should not be required to place and retain on its payroll those whose continued presence

⁴Both Courts acknowledge, *Town & Country*, 34 F.3d at 627; *H.B. Zachry*, 886 F.2d at 72, that job applicants are considered "employees" within the meaning of §2(3). See *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 185 (1941).

on the job will be determined by an entity other than itself").

This reliance on motivation is a legally and logically unsatisfying justification for the court's result. The persons working for *Town & Country* were at-will employees, meaning they could be fired at any time and for any reason other than a legally forbidden one.⁵ By the same token, an at-will employee can quit whenever he chooses and for whatever reason strikes his fancy. *Pine River State Bank v. Mettelle*, 333 N.W.2d 622, 627 (Minn. 1983) (In an at-will situation, "the employer can summarily dismiss the employee for any reason or no reason, and . . . the employee . . . is under no obligation to remain on the job."); *Randall v. Northern Milk Prods.*, 519 N.W.2d 456, 459-60 (Minn. Ct. App. 1994).⁶

⁵That is, the Company had the prerogative to terminate for a *some* reason (an employee's demonstrated incompetence), an irrational reason (an employee's decision to wear purple laces in his work boots), or no reason whatsoever. Even in an at-will situation, however, an employer cannot terminate for legally prohibited reasons such as race, gender or engaging in concerted protected activity.

⁶Minnesota law would have governed, since the job interviews, the hiring and the work itself were conducted in that State. *Town & Country*, 309 N.L.R.B. at 1250-52. The at-will employment precepts that an employer or an employee may terminate the relationship at any time for any lawful reason are universal and, indeed, define the doctrine. See *Novasel v. Nationwide Ins. Co.*, 721 F.2d 894, 896 & n.2 (3d Cir. 1983); *Blade, Employment at Will v. Individual Freedom*, 67 Colum. L. Rev. 1404, 1419-20 (1967); see also *Mares v. Conagra Poultry Co., Inc.* 971 F.2d 492-95 (10th Cir. 1992) (Colorado law); *Arledge v. Stratmar Systems, Inc.*, 948 F.2d

Thus, a worker may lawfully depart an at-will employer because a union tells him to or because his spouse is transferred to a job in another state or because his church requires he undertake a religious mission.⁷

If a company wants the benefits of an at-will relationship with its workers, it must accept the burdens as well. The company's remedy against sudden employee departures rests in employment contracts for a specific term, whether the term reflects a given time period or completion of a particular job. That a business decides to operate as an at-will employer is hardly a reason for depriving members of its work force of the Act's protections, where those employees would be at liberty to quit without notice for any reason including the influence of third parties.

845, 847-48 (2d Cir. 1991) (New York law); *LaScola v. US Sprint*, 946 F.2d 559, 563 (7th Cir. 1991) (Illinois law); *Zimmerman v. H.E. Butt Grocery Co.*, 932 F.2d 469, 471 (5th Cir.), cert. denied, 502 U.S. 984 (1991) (Texas law); *Broussard v. CACI, Inc.-Federal*, 780 F.2d 162, 163 (1st Cir. 1986) (Maine law).

⁷For example, members of the Church of Jesus Christ of Latter Day Saints are expected to undertake extended religious missions, often lasting a year or more, as an integral part of their faith. See *Leader of Mormons Reaffirms Primary Church Teachings*, Los Angeles Times, Oct. 24, 1994, Sec. B, p. 4. Would a Town & Country worker subject to this religious call no longer be considered an "employee" under the Act? If so, he would be without protection not only for any concerted activity, but also for filing a charge or even giving evidence to the NLRB. See 29 U.S.C. § 158(a)(4).

In considering the Eighth Circuit's notion that the union's "direction" renders paid organizers unprotected, it is important to keep in mind both the nature of the direction supplied by the union and the jobs for which the organizers applied. The organizers sought work as electricians -- not as corporate decision makers or confidential employees with access to trade secrets, financial data or other proprietary information. The evidence establishes that the union essentially told them to do the work assigned them and, during nonwork hours, actively promote the IBEW to other employees. The former is what Town & Country would expect of any employee, and the latter is what Congress has declared must be permitted as a matter of law. *Republic Aviation*, 324 U.S. at 802-05 (union solicitation by employees on the employer's property during nonworking hours protected under the Act).

At bottom, the Eighth Circuit's decision rests on the determination that a worker does not enjoy the protections of the Act because a union has told him to engage in concerted activity and will financially subsidize him for doing so. The decision creates a legal distinction between paid organizers, on the one hand, and unpaid organizers or volunteers, on the other, based on nothing more than their reasons for pursuing precisely the same activities. According to this thesis, the former presumably act because they have been paid to do so and the latter because they wish to improve their working conditions.⁸

⁸Doubtless, this characterization unfairly denigrates the motives of many union organizers who act, not out of a mercenary interest in a paycheck, but out of a fundamental belief in the

Whatever the accuracy of these somewhat dubious presumptions, the lines they draw for purposes of bounding the protections of the NLRA are neither invited by nor countenanced in the statutory language. This Court should reverse and recognize that the protections of the Act extend to paid organizers seeking employment with or working for nonunion employers so long as they pursue lawful concerted activity. Congress long ago determined concerted organizing activity to be in the public interest and, hence, deserving of protection. Neither the public interest served nor the protection afforded varies with the reasons a person chooses to engage in that activity.

This artificial distinction, based on the perceived motivations of the actors rather than their actual conduct, ultimately leads to bizarre or unprincipled outcomes and would gut the essential purpose of the Act.

For example, a longtime employee in a nonunion fish canning factory may meet with other employees during their lunch break to discuss seeking union representation through an election petition. This particular employee hopes to achieve higher wages and a better health care plan through collective bargaining. His efforts represent quintessential protected activity under the Act. Suppose, however, he is joined in this lunch meeting by the following: a worker who attends college part-time and who has been told by one of his professors that an organizing drive would make a terrific topic for a term paper; a worker who believes unionizing would be a way of getting back at his supervisor from whom he dislikes taking

principles of unionism.

orders because she is female; and a worker who anticipates unionization will lead directly to the formation of a company-sponsored softball team. Of these three, it might be said the first has a rational, if wholly irrelevant motive for his actions; the second has a malevolent motive; and the third has a motive that can be charitably characterized as goofy. As the NLRA generally has been construed, all three would be protected in their concerted activity and could not be terminated or otherwise subjected to discriminatory treatment because of those efforts. See *Ohio Valley Graphic Arts, Inc.*, 234 N.L.R.B. 493 & n.4 (1978) ("[e]mployees act for a multitude of reasons in seeking representation and such actions are protected without regard to the individual's motivation"); *Young Hinkle Corp.*, 244 N.L.R.B. 264, 266 (1979); *Johnnie Johnson Tire Co.*, 271 N.L.R.B. 293, 294 (1984), enforced mem. 767 F.2d 916 (5th Cir. 1985) (degree of merit or lack of merit of particular grievance does not affect protected nature of employee concerted activity); *NLRB v. Washington Aluminum Co.*, 370 U.S. 9, 16-17 (1962) (reasonableness of method of protest adopted by employees does not decide protected nature of concerted activity).

This, however, would not necessarily be true were the *Town & Country* rationale accepted as a proper reading of the NLRA. If this Court sanctions the motive-based analysis initiated in *Town & Country* and *Zachry*, workers seldom, if ever, could undertake concerted activity with any real assurance they would be protected. That determination would hinge on their motives or subjective reasons for acting. Unfair labor practice hearings would become fact-finding quagmires in which employers could endlessly

challenge the motives of those engaging in organizing.

Just how would administrative law judges, the Board and ultimately the courts decide which motives are "good" and, hence, confer protection on concerted activity and which are "bad" and, therefore, fail to do so? Should the person entertaining a seemingly frivolous goal of bargaining for a bunch of softball uniforms, bats and balls fall outside the protection of the Act? Presumably not, since Congress did not mandate that employees seek only certain specified financial objectives through their concerted activities. Ought the worker disgruntled with his female supervisor be protected in his organizing, even though his motive is spiteful and ugly? Is the college student with a purely academic interest and who acts solely at the direction of his professor more or less deserving of protection? This says nothing about the mixed-motive situation in which the actor holds both a conventional reason, e.g., better working conditions, and a less orthodox one, e.g., a top grade in a labor relations class.

Broad application of the *Town & Country* rationale would have an extraordinarily deleterious impact on concerted activity. A given worker could lose all protections of the NLRA if his motives for engaging in otherwise lawful concerted activity were *post facto* judicially deemed unworthy.

This would not only have a strong deterrent effect on individual employees, but would breed an even more insidious result infecting the very core of unionism -- joint or united action for a common good. Settled interpretation of the NLRA holds that an

"employee" cannot engage in protected concerted activity by acting alone or with nonemployees. See, e.g., *Prill v. NLRB*, 835 F.2d 1481, 1485 (D.C. Cir. 1987), cert. denied, 487 U.S. 1205 (1988); *NLRB v. Texas Natural Gasoline Corp.*, 253 F.2d 322, 325 (5th Cir. 1958) (no concerted activity where one current and one terminated employee jointly protested latter's dismissal). Under the *Town & Country* rationale, a worker organizing based on a so-called suspect motive -- such as pay from a union -- would fall outside the definition of an "employee" for purposes of the Act. In turn, a fellow worker, whose motive is beyond question, would not be engaged in protected concerted activity were he to act with the first worker. Neither would enjoy the NLRA's protection, and both would face immediate termination without legal recourse.

Acceptance of the Eighth Circuit's view would require anyone contemplating concerted activity to assess the motives of his or her fellow actors and guess whether those motives later would be recognized as judicially acceptable, thus affording shelter under the Act against an employer's workplace retaliation. Purity of deed would no longer be enough; purity of heart would become the touchstone. It is hard to imagine a judicial doctrine having a greater adverse impact on concerted activity or being more destructive of the purposes of the NLRA in shielding a worker's right to organize free from harassment and discrimination. Just as this Court held that excluding job applicants from the Act's definition of employees "inevitably operates against the whole idea of the legitimacy of organization. . . . [and] undermines the principle which, as we have seen, is recognized as basic to the attainment of industrial peace," *Phelps Dodge*

Corp., 313 U.S. at 185, excluding workers based on their motives for organizing would be at least as pernicious.

These untoward results are even more pronounced in considering how the Town & Country rationale would be applied in the case of an employee of a nonunion company who becomes a paid union organizer sometime after he is hired. See *Willmar Elec. Service, Inc. v. NLRB*, 968 F.2d 1327, 1329 (D.C. Cir. 1992), cert. denied, ___ U.S. ___, 113 S. Ct. 1252 (1993) (refusal to hire a paid union organizer is "legally indistinguishable" from firing a company employee who "has just established similar ties to a union"). Based on the Eighth Circuit's treatment of Hansen, it follows that an employee of a nonunion company who receives some sort of financial assistance from a union to pursue organizing activity ceases to be a protected "employee." As a result, he may be terminated for engaging in concerted activity or even for filing a NLRB charge or giving testimony in connection with someone else's charge. Moreover, another employee would be protected if the two engage in concerted activity before the first employee becomes a paid organizer, but not after.

Trying to determine the degree of union financial support necessary to convert an otherwise protected employee into an unprotected Town & Country employee would hopelessly compound the analysis. In other words, just how big a stipend would be required to create economic dependence on the union or whatever rather chimerical danger underlies the Town & Country decision? Does the answer depend on the extent to which the employee relies on the stipend to meet his family's basic living expenses? Is accepting money from the union only to print handbills

or reimburse out-of-pocket expenses sufficient? Here, again, an employee would be unable to decide with any equanimity whether he or his colleagues might fall on the far side of the Town & Country line and lose their protection under the Act.

The Town & Country decision also raises troubling questions if applied to an employer that is already unionized. Typically, union officers continue working for the employer but receive some compensation from the labor organization for the performance of their union duties. See *Sunland Construction Co., Inc.*, 311 N.L.R.B. 685, n.5. These duties necessarily entail traditional concerted activity, such as processing grievances or contacting new employees about becoming union members. The Town & Country rationale certainly suggests these union officials may cease to be "employees" and, therefore, stand beyond the umbrella of the Act.

As these examples illustrate, Town & Country is at war with the public policies Congress cited as justifying the NLRA and would do violence to that carefully ordered scheme balancing the interests of labor, management and the citizenry as a whole. Those policies are far better served by keeping motive or status as a paid organizer altogether removed from any equation used to determine who should be protected under the Act.

Since the Act's treatment of job applicants is no different than that of persons already employed, an applicant's motivation or reason for wanting to engage in concerted activity, if hired, is of no legal consequence. An employer cannot, consistent with the protections of 29 U.S.C. §§157 and 158(a)(3), discriminate based on those

motives. Just as a nonunion employer could not refuse to hire a person who announces an intention to organize the company because he believes four-square in the principles of unionism, *Fluor Daniel, Inc.*, 304 N.L.R.B. 970 (1991), enforced mem., 976 F.2d 744, reh'g denied, 980 F.2d 1449 (11th Cir. 1992), that employer should not be allowed to reject an applicant who intends to do just the same because he is a paid union organizer.

IV. THE EIGHTH CIRCUIT'S DECISION IMPROPERLY EQUATES ORGANIZING WITH UNPROTECTED "DISLOYALTY"

Lurking barely beneath the surface of *Town & Country* and *H.B. Zachry Co.* is the notion that an applicant bent on organizing a nonunion employer at the behest of a labor organization is somehow "disloyal" to that employer. *Town & Country*, 34 F.3d at 628. ("were this a case involving a typical job applicant, we might well agree that an employee may be simultaneously loyal to his union and to his nonunion employer."); *H.B. Zachry Co.*, 886 F.2d at 74 (remarking on the supposed "adversariness between employers and unions"); see also *Willmar Elec. Service, Inc. v. NLRB*, 968 F.2d at 1330. In embracing this "disloyalty" claim, the lower courts appear to have disregarded the congressional determinations protecting concerted activity and collective bargaining and have, instead, substituted their own anti-union predilections and a strong distaste for one specific organizing technique.

The Board and the courts have never held that an employer may equate either a desire to organize a union or an association with a union as evidence of "disloyalty." See *Lipsey*, 172 N.L.R.B. at 1535; *National Fabricators, Inc.*, 903 F.2d at 399; *Texaco,*

Inc. v. NLRB, 462 F.2d 812, 814 (3d Cir. 1972), cert. denied, 409 U.S. 1008 (1972) (participation in protected concerted activity may not be treated as "disloyal" by employer); *Misericordia Hospital Medical Center v. NLRB*, 623 F.2d 808, 810-12 (2d Cir. 1980); *Southwire Co. v. NLRB*, 820 F.2d 453, 462-63 (D.C. Cir. 1987); *Peavey Co. v. NLRB*, 648 F.2d 460, 462 (7th Cir. 1981). The Board and the courts have dealt with the issue of loyalty in a number of different contexts. The Act clearly does not bar an employer from discharging an employee who engages in a "disloyal" act in the sense that the employee harms the employer's business. See *NLRB v. Local 1229, IBEW*, 346 U.S. 464 (1953) (upholding discharge for disparagement of employer's product).

Given the explicit congressional recognition that concerted activity serves the public interest and requires protection, neither paid organizers nor union-minded volunteers can be legitimately branded as disloyal for engaging in such conduct. The sort of "loyalty" the Eighth Circuit apparently finds acceptable would demand that a worker be willing to toil for substandard wages and benefits, while eschewing lawful means of attempting to improve his or her economic lot through organizing and collective bargaining. According to the Eighth Circuit, those efforts -- notwithstanding their legal sanction -- amount to little more than industrial treason, especially if they are aided and abetted by paid union organizers. This philosophy simply cannot be reconciled with the statement of public policy found in the NLRA. See 29 U.S.C. §151. Accord *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. at 22-23. It ought not, therefore, play any part in a judicial decision construing the NLRA.

In deciding cases, federal judges should not act as architects of public policy, especially when Congress, as with the NLRA, has already drawn detailed blueprints. At each level, the judiciary must give heed to legislatively-pronounced policies rather than pursuing independent social engineering. *National Broiler Mktg. Ass'n v. United States*, 436 U.S. 816, 827 (1978); *Sinclair Refining Co. v. Atkinson*, 370 U.S. 195, 215 (1962). This is true whatever view the courts may take of congressional wisdom or the lack thereof in making those policy choices. *TVA v. Hill*, 437 U.S. 153, 194-95 (1978). As Justice Hugo Black reminded his colleagues, "The responsibility of this Court . . . is to construe and enforce the Constitution and the laws of the land as they are and not to legislate social policy on the basis of our personal inclinations." *Evans v. Abney*, 396 U.S. 435, 447 (1970). Nor will it do to suggest that the relationship between unions and management has been significantly altered in the six decades since passage of the NLRA as a justification of these results. Concerted activity remains as important today as it was then. See *Beth Israel Hospital*, 437 U.S. at 497-98 (in 1974, Congress extends NLRA to health care industry to remedy low wages and poor working conditions).

But even if the policies supporting a statute have become outmoded or no longer serve the public interest, the legislature, rather than the judiciary, must act to correct those flaws that have developed over time. As this Court has said: "[A] statute 'is not an empty vessel into which this Court is free to pour a vintage that we think better suits present-day tastes.' Considerations of this kind are for the Congress, not the courts." *National Broiler Mktg. Ass'n*, 436 U.S. 816, 827 (citations

omitted), (quoting *United States v. Sisson*, 399 U.S. 267, 297 (1970) and rejecting argument that agribusiness had so radically changed in the 55 years following enactment of the Capper-Volstead Act, the Court might disregard the legislative intent and language to expand the measure's coverage).

The Eighth Circuit's emphasis on "union direction" as synonymous with disloyalty ignores the congressional view of labor unions as institutions. The Act does not require that, in order to be protected, concerted activity be spontaneous or unplanned. As this Court has noted on more than one occasion, "organization rights are not viable in a vacuum"; their exercise depends both on the right of employees to discuss organization among themselves and the right of unions to discuss organization with employees. *Central Hardware Co. v. NLRB*, 407 U.S. 539, 542-43 (1972); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. at 33 (unions are "essential to give laborers opportunity to deal on equality with their employer").

The Eighth Circuit contends that paid organizers may be poor employees given to sloth or disruptive conduct when they should be working. *Town & Country*, 34 F.3d at 629. There is, however, no body of evidence that suggests paid organizers as a class have any tendency to engage in wrongful conduct. *Town & Country*, 309 N.L.R.B. at 1257. Indeed, the paid organizer has tremendous incentive to perform his assigned tasks for the nonunion employer satisfactorily. To do otherwise not only subjects him to discharge, but will also earn him the disdain of the very workers he is trying to reach. Even the Fourth Circuit, in *H.B. Zachry*, conceded that the record evidence demonstrated that the work of the paid organizer there "was satisfactory, and

that he was proficient at his trade." 886 F.2d at 71. Other cases involving paid organizers contain similar findings. See *Oak Apparel*, 218 N.L.R.B. 701, 707 (1975); *Pilliod of Mississippi, Inc.*, 275 N.L.R.B. 799, 811 (1985). In this case, while Town & Country alleged Hansen was a poor worker and engaged in misconduct, the ALJ characterized this defense as "structured upon a composite of lies." *Town & Country*, 309 N.L.R.B. at 1275.

Assuming, *arguendo*, that the Eighth Circuit's premise were sound, stripping paid organizers of all protection under the Act goes too far. A paid organizer is to be treated no differently than any other member of the company's work force; he may be terminated for poor job performance, just as anyone else might. While the organizer cannot be singled out for discriminatory treatment, he does not get "carte blanche in the workplace." *Town & Country*, 309 N.L.R.B. at 1257. See also *Sears, Roebuck & Co.*, 170 N.L.R.B. 533 (1968) (upholding discharge of paid organizer for failing to tend to his job duties); *Wellington Mfg. v. NLRB*, 330 F.2d 579, 586 (4th Cir.), cert. denied, 379 U.S. 882 (1964).

⁹Amicus notes that the Eighth Circuit opinion attempts -- unfairly -- to suggest the opposite. In its decision, the lower court stated, "Hanson's crewmates complained to their foreman about Hanson's non-stop talking as well as his poor workmanship and low productivity." *Town & Country*, 34 F.3d at 627. The appellate court omits any reference to the ALJ's rejection of this claim in its narrative of the pertinent facts.

V. THE EIGHTH CIRCUIT INCORRECTLY APPLIES THE COMMON LAW GOVERNING MASTER-SERVANT RELATIONSHIPS

In its opinion, the Eighth Circuit cites the common law agency rules governing the relationship between master and servant as support for finding paid organizers unprotected. *Town & Country*, 34 F.3d at 628, 629. This effort is doubly misguided. There is no need to resort to the common law in construing the statutory definition of "employee" as it applies to paid organizers. And, even if there were, those principles fail to support the claim that paid organizers should not be considered statutory employees.

The Eighth Circuit incorrectly relies on *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. ___, 112 S. Ct. 1344 (1992) as a bridge to the common law of master-servant to define who may be an employee for purposes of the NLRA. Essentially, *Darden* counsels that when a statute fails to provide any useful definition of the term "employee," the courts should look, at least presumptively, to the common law for guidance. *Id.* at 1348. See also *Community for Creative Non-Violence v. Reid*, 490 U.S. 730 (1989). In *Darden*, the Court was called upon to determine the meaning of the term "employee" as used in the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §1001, et. seq. ERISA provides a wholly circular and admittedly unenlightening definition: "The term 'employee' means any individual employed by an employer." 29 U.S.C. §1002(6).

The Eighth Circuit's characterization of the NLRA's definition of "employee" as "providing little help," *Town & Country*, 34 F.3d at 628, is clearly incorrect. In

contrast to ERISA, the NLRA offers a broad general definition of "employee," accompanied by a series of specific exceptions. In *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883 (1984), this Court had no difficulty in determining the status of illegal aliens under the Act, without resort to the common law. The *Sure-Tan* decision recognized that "the breadth of [the] definition is striking" and extends to all workers except those specifically enumerated as being excluded. 467 U.S. at 891. The Court concluded that illegal aliens were protected "employees," under §2(3), since they were not among the groups excepted. 467 U.S. at 891-92. Based on this rationale alone, paid organizers must be considered "employees" under the Act because they are not expressly excluded.

In short, the Court need not reach the *Darden* analysis in the instant case because Congress has clearly outlined who is an "employee" covered under the NLRA and who is not.¹⁰

¹⁰In *Darden*, the Court notes that the definition of "employee" contained in the original Wagner Act was not particularly helpful in determining whether persons traditionally thought of as independent contractors should have been treated as statutory employees. Thus, in *NLRB v. Hearst Publications, Inc.*, 322 U.S. 111 (1944), the Court held newsboys to be covered employees, when under the common law they probably would have been independent contractors. Using a similar approach, the Court discounted common law rules in differentiating between independent contractors and covered "employees" under the Social Security Act. *United States v. Silk*, 331 U.S. 704 (1947). Congress responded to *Silk*, by amending the Social Security Act's definition of "employee" to explicitly include reference to the "usual common law rules" determining who should be an independent

Moreover, this Court has emphasized that special deference is to be accorded longstanding consistent interpretations of the Act by the NLRB. *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 401-02 (1983); *Bayside Enterprises, Inc. v. NLRB*, 429 U.S. 298 (1977). In this case the NLRB deliberately reconsidered its interpretation regarding paid organizers. After carefully reviewing the statutory language, legislative history and policy arguments, the NLRB reaffirmed its view that paid organizers fall within the ambit of §2(3). *Sunland Construction Co., Inc.*, 309 N.L.R.B. 1224, 1231-32 (1992) (Oviatt, M., concurring). The Eighth Circuit inappropriately rejected the Board's studied conclusion in favor of its own determination.

contractor. *Darden*, 112 S. Ct. at 1349. In the Taft-Hartley amendments to the NLRA, Congress simply added the term "independent contractor" to the list of classes excluded from the definition of "employee." Therefore, *Darden* cannot be read to say that the present NLRA definition of employee is unhelpful in general or specifically with regard to the status of paid organizers. This is particularly true in light of the Court's decision in *Sure Tan*.

The common law, however, could be properly used to determine if a particular person or group falls within one of the exceptions as opposed to the general definition of "employee". *NLRB v. United Ins. Co.*, 390 U.S. 254, 256 (1968). For example, if an employer contends John Jones is an independent contractor and the agency contends he is an employee, the Board or the courts should look to the common law for guidance in resolving this question. Here, that inquiry is both unnecessary and irrelevant, since paid organizers are not among the excluded classes and *Town & Country* makes no claim that they do fall within an excluded class.

Even if common law agency or master-servant rules control, those principles do not support the *Town & Country* result. The common law recognized that one could be employed simultaneously by two "masters." The Restatement of Agency (2d), §226, states that "[a] person may be the servant of two masters" at the same time, so long as "the service to one does not involve abandonment of the service to the other." The courts and commentators support this principle. *Mazer v. Lipshutz*, 360 F.2d 275, 278 (3d Cir.) (citing "sound doctrine that a servant may have two masters at one time"), cert. denied, 385 U.S. 833 (1966); *Beaver v. Jacuzzi Brothers, Inc.*, 454 F.2d 284, 285 (8th Cir. 1972) ("employee may be employed by more than one employer even while doing the same work"); W. Seavy, *Handbook of the Law of Agency*, (West, 1964), at p. 146. The Eighth Circuit concedes this to be true, but, citing comments to the Restatement, argues that ordinarily "the control a master can properly exercise over the conduct of a servant prevents simultaneous service for two independent employers." *Town & Country*, 34 F.3d at 628.

Contrary to the Eighth Circuit's suggestion, an organizer, paid or unpaid, does not, as a practical matter, engage in simultaneous service to two masters during the same working hours. During working hours, the organizer serves the interests of the employer by performing his or her assigned job duties. Organizing activities occur during non-working time--before or after work and lunch or break time. See *Republic Aviation v. NLRB*, 324 U.S. at 802 n. 8 (employer can prohibit solicitation during working hours). The organizer must, of necessity, adhere to this schedule, since failure to perform assigned duties can result

in discharge for cause. Hence, the organizer's dual employment is more akin to moonlighting, than the simultaneous service examples used in the Restatement.

The Eighth Circuit's analysis equates the advantages that accrue to the organizer as a result of his presence on the job site as a "service" to the union (and a concomitant disservice to the employer). An organizer's effectiveness will typically be enhanced by the opportunity to work side-by-side with the other employees whom he is trying to organize, since this makes it easier to become acquainted with them. Moreover, employees are more likely to give a pro-union message delivered by a fellow worker, as opposed to a stranger, a fair hearing. This is merely a by-product of the organizer's physical presence and not the result of some actual work performed for the union.

There simply is no conflict between performing work for a company and, during nonwork time, pursuing organizing activities among one's fellow employees. The only supposed conflict derives from the notion that organizing is antithetical to the best interests of the company and, hence, those who would engage in such activity must be disloyal. As previously noted, given that Congress has expressly found concerted activity to be in the public interest, this argument carries no weight.

That an employee receives some sort of payment from a union for engaging in organizing activities or applies for work at his union's request for the purpose of assisting in the union's organizing efforts does not change this analysis. Under either circumstance, the nature of the activity protected and the employer's ability to

protect against poor workmanship or malfeasance is the same as it would be if no payment or "union direction" were involved.¹¹ Indeed, as previously noted, even if the union "master" were to suggest the organizer leave the employer's service, this is no more than the organizer is legally entitled to do for any reason as an at-will employee. See *supra.*, pp. 11-12.

Accordingly, for all the reasons cited above, as well as in the principal briefs filed by the NLRB, the Boilermakers urge this Court to affirm the NLRB's interpretation finding paid organizers to be protected under the Act.

Respectfully submitted,

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¹¹Here, the evidence is undisputed that all of the applicants were sincerely interested in and ready to accept employment with Town & Country. The Court does not have before it the case of an organizer, paid or unpaid, who has no intention of accepting employment if offered. See *Lipsey, Inc.*, 172 N.L.R.B. 1535 (1968).

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

—v.—

TOWN AND COUNTRY ELECTRIC, INC.,
et al.,

Respondents.

ON WRIT OF *CERTIORARI* TO THE
UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

**BRIEF *AMICUS CURIAE* OF THE AMERICAN CIVIL
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INTEREST OF AMICUS¹

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with nearly 300,000 members dedicated to defending the principles of liberty and equality embodied in the Bill of Rights. Throughout its 75 year history, the ACLU has supported the statutory rights of employees to organize and to freedom of speech without fear of reprisal. In furtherance of that view, the ACLU has participated as *amicus curiae* in cases before this Court involving the democratic rights of workers under federal labor law, *see, e.g., Wooddell v. International Brotherhood of Elec. Workers, Local No. 71*, 502 U.S. ___, 112 S.Ct. 494 (1991); *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. and Const. Trades Council*, 485 U.S. 568 (1988); *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133 (1990).

STATEMENT OF THE CASE²

Respondent Town & Country Electric, Inc. is a large nonunion electrical contractor based in Wisconsin. In early September, 1989, Town & Country was awarded a contract to perform electrical renovation work at the Boise Cascade paper mill in International Falls, Minnesota. Respondent subsequently learned that it was required to employ at least one Minnesota-licensed electrician for every two unlicensed electricians working at the job site. In order to meet this requirement, respondent engaged a temporary employment agency. Respondent made clear, however, that applicants had to be "able to work a merit" -- meaning nonunion --

¹ Letters of consent to the filing of this brief have been lodged with the Clerk of the Court pursuant to Rule 37.3.

² This statement of the case is taken from the Board's decision.

shop, and applicants who contacted the agency were specifically asked whether they would work nonunion.

On September 7, two Town & Country officials arrived in Minneapolis for a day of interviews. They interviewed a nonunion electrician who had a scheduled appointment, but did not hire him. The other dozen or so electricians present did not have scheduled appointments, although one, Malcolm Hansen, was told by the receptionist that he could be interviewed anyway. The applicants were all told that the job was nonunion, but nevertheless expressed interest in the work.

Town & Country officials then asked an agency official how these particular applicants knew of the job openings. "I think they're union," the agency official said, whereupon Town & Country refused to do any further interviews. Hansen protested, having already been told to report for an interview. Town and Country relented, and Hansen was hired, beginning work five days later. On the job site, he solicited his co-workers to join the union, and subsequently was fired.

The applicants who were denied interviews were members of the International Brotherhood of Electrical Workers and had been authorized by the union to work nonunion jobs in order to organize employees. Two of the applicants were paid union organizers; the remainder were not union employees. At least some of the applicants expected to receive financial support from a union fund established to reimburse pay differentials incurred by union members who were "salting" nonunion jobs in order to organize the workforce. Nothing in the record suggests that on September 7, when respondent refused to interview these applicants, it knew that they had any kind of financial relationship with the union, or that they had applied for the jobs essentially at the behest of the union.

The Board found that respondent fired Hansen because of his organizational activities on behalf of the union. The Board further found that respondent's refusal to interview union members, as well as the discriminatory discharge of Hansen, violated §8(a)(3) of the NLRA, which prohibits employers from discrimination that "discourage[s] membership in any labor organization." The Court of Appeals for the Eighth Circuit denied enforcement of the Board's order, holding that the discharged workers were not "employees" under §2(3) of the Act because they were "under the control" of the union or expected compensation from the union.

SUMMARY OF ARGUMENT

This case raises a question of statutory construction essential to the right of workers to organize and to exchange information about unions with co-workers: whether §2(3) of the National Labor Relations Act, 29 U.S.C. §152(3), excludes from its protection job applicants and employees whose organizing activity is encouraged or compensated by a union. In the real world of nonunion workplaces, the issues before the Court are these: Can an employer refuse to interview an applicant who is a union member and has been encouraged by the union to work a nonunion job? Can an employer refuse to interview an applicant who is a union staff member and expects reimbursement from the union for any pay differential incurred by working a nonunion job? And, can an employer fire an otherwise satisfactory worker who is also a paid union organizer?

The clear and unambiguous language of §2(3) of the NLRA includes "any employee," other than a few exceptions not relevant here. And this Court has consistently recognized that job applicants, as well as those who have been hired, fit comfortably within this provision. Nothing in the language of that section supports respondent's contention that an employee loses his protection under §2(3) -- protec-

tion explicitly designed to prevent employers from retaliating against union members in the hiring and firing process -- because of his financial or associational relation with the union. On the contrary, as the National Labor Relations Board reasonably found, when Congress intended to exclude particular categories of workers from the protective scope of §2(3), it explicitly provided for that result in the language of the Act.

The Board deals at length with the appropriate deference that is due an administrative agency's reasonable interpretation of an unambiguous statute. We agree that the statute is unambiguous. In addition, however, the legislative purpose of the NLRA supports the Board's reading of the statutory text. The NLRA was intended to facilitate self-organization, which this Court has recognized as "the central purpose of the Act." *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 193 (1941). In pursuit of this goal, Congress established face-to-face communication between one employee and another at the job site as the central way for workers to receive information about unions and to effectuate their right to self-organize. Through the personal encounter with co-workers at the job site, workers obtain the knowledge that they need to make informed and free decisions about whether to choose or reject a union. It is a kind of knowledge and interaction that cannot be duplicated from other sources, whether the union, the media or literature.

This Court has repeatedly affirmed the primacy of face-to-face communication between co-workers on the job to achieve the statutory goal of self-organizing, and a half century of law concerning the organizing process has been built on the centrality of this workplace encounter between employees. To deprive employees of union resources that they need to engage in self-organization would have a chilling effect on rights explicitly protected under the Act.

The decision below rips an exception out of the protec-

tive fabric of the Act that would thus "inevitably operate[] against the whole idea of the legitimacy of organization." *Phelps Dodge Corp. v. NLRB*, 313 U.S. at 185. Furthermore, because the rule of exclusion adopted by the court below is neither self-defining nor well-defined, it will inevitably invite abuses during the hiring and screening processes that this Court has repeatedly condemned. It also jettisons the traditional balancing test that this Court has employed when weighing the employee's right to speak and associate against the employer's managerial and property interests.

In such a balance, the employer's interest must be carefully defined. Respondent in this case has put forward no legitimate interest to justify the withholding of statutory protection. The only asserted interest on this record is the employer's preference not to hire union sympathizers -- whether members, staff or paid organizers -- because they are in conflict with his desire to maintain a nonunion workplace. Unlike a nonemployee union organizer who seeks access to an employer's property, the employee organizers in this case seek only to be treated equally in the hiring and firing process with their nonunion colleagues. A conflict between these union sympathizers and the employer can be said to exist only if union organizing is incompatible with the employer's right to run his business. That premise, however, has been definitively rejected by both Congress and this Court.

ARGUMENT

The question whether §2(3) of the NLRA accords protection to employees who are or may be compensated by an organizing union for their organizing activity, and to applicants who seek to work a nonunion job at the behest of a labor organization, implicates two of the most critical purposes of the Act. First, the right of employees to self-organize lies at the heart of the NLRA. Second, face-to-

face communication between employees at the job site is the primary way that workers receive information about unions, allowing them to choose freely whether to accept or reject a union. In light of these statutory goals, the Board reasonably determined that workers retain protection under the Act as "employees," even if they have an associational or financial relation to an organizing union.

I. EMPLOYEE SELF-ORGANIZATION LIES AT THE CORE OF THE NATIONAL LABOR RELATIONS ACT

This Court has repeatedly recognized that, in enacting the NLRA, Congress established "workers' self-organization" as "the central purpose of the Act." *Phelps Dodge Corp. v. NLRB*, 313 U.S. at 193. This choice was deliberate, but it was not inevitable. At least two other options were available: national labor policy could have been founded on the principle of compulsory representation or, alternatively, on the principle that the employees' right to organize was dependent on the employer's acquiescence. By rejecting these two extremes, Congress implicitly recognized that the principle of employee self-organization is more consistent with basic constitutional values of individual autonomy, freedom of association, and limited government.³

³ The idea of compulsory representation of employees claimed considerable political support in the early 1930's. For example, the National Recovery Administration, held unconstitutional by this Court in *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935), included Codes of Industry that the President might impose on unwilling industries. See generally James Q. Whitman, "Of Corporatism, Fascism, and the First New Deal," 39 Am.J.Comp.L. 747, 764-66 (1991). Today, most European countries maintain statutory programs of compulsory employee representation. See generally Richard B. Freeman and Joel Rogers, "Who Speaks for Us? Employee Representation in a Nonunion (continued...)"

These values are reflected in the language of the NLRA, which makes it illegal for an employer to refuse to recognize a union that has been duly organized by the employees. §8(a)(5), 29 U.S.C. §158(a)(5). Before the Act, the employer had sole discretion over whether a particular job would be "union" or "nonunion." The NLRA, however, assigns the decision whether to unionize to the employees themselves. Section 9(a) of the NLRA thus provides:

Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining

29 U.S.C. §159(a).

In enacting the NLRA, Congress thus definitively rejected the idea of an employer-created labor organization, on the one hand, and a government-created labor organization, on the other. For nearly sixty years, the Act has been understood to mean that American employees become organized if, but only if, they freely choose a union for themselves. Although employee self-organization imposes certain costs on both managers and unions, it serves important

³ (...continued)
Labor Market," in *EMPLOYEE REPRESENTATION: ALTERNATIVES AND FUTURE DIRECTIONS* 13, 45-56 (Bruce E. Kaufman & Morris M. Kleiner 1993). Studies indicate that the existence of such work councils helps preserve union representation during periods of economic downturn. See Lowell Turner, *DEMOCRACY AT WORK: CHANGING WORLD MARKETS AND THE FUTURE OF LABOR UNIONS* 223 (1991). In short, the right to employee self-organization, as opposed to compulsory representation, comes at a price that can be measured in organizing costs, decreased union density, insecurity of union tenure, and difficulties of mobilizing collective action.

public and constitutional ideals, establishing democratic procedures in industry (and correlative rights of association and speech for employees and employers), while maintaining individual autonomy and limited government.

Proponents of the NLRA put forward this understanding of unionization as an example of a larger vision of representative democracy. Not surprisingly, it is the constitutional analogy to which courts and commentators often turn in order to interpret the Act. As Senator Robert F. Wagner, the Act's major proponent, put it:

The principles of my proposal were surprisingly simple. They were founded upon the accepted facts that we must have democracy in industry as well as in government; that democracy in industry means fair participation by those who work in the decisions vitally affecting their lives and livelihood.

Milton Derber, *THE AMERICAN IDEA OF INDUSTRIAL DEMOCRACY*, 1865-1965 321 (1970), quoting N.Y. Times, Apr. 13, 1937, at 20. Senator Wagner argued that the NLRA constituted "the only key to the problem of economic stability if we intend to rely upon democratic self-help by industry and labor, instead of courting the pitfalls of an arbitrary or totalitarian state." Joseph Huthmacher, *SENATOR ROBERT F. WAGNER AND THE RISE OF URBAN LIBERALISM* 195 (1968). Employer-created organization would not bring democracy to industry, while compulsory organization would do so only at the risk of an unacceptable increase in government power. To the 74th Congress which enacted the NLRA, employee self-organization best enacted their vision of constitutional democracy. Numerous aspects of labor law follow directly from this legislative choice.

II. FACE-TO-FACE COMMUNICATION BETWEEN EMPLOYEES IS CRITICAL TO THE RIGHT TO SELF-ORGANIZATION WHICH LIES AT THE CORE OF THE NLRA

In an unbroken line of decisions stretching back over a half century, this Court has consistently recognized that the right of employees to self-organize depends on access to information concerning the union, and that the primary vehicle for acquiring such information under the NLRA is the face-to-face encounter between employees at the workplace, as a worker who favors the union communicates his message to a co-worker and solicits him to join the union.

To be sure, an employee may be able to obtain information about unions from other sources: the union organizer outside company property, the public meeting, or mass media and literature. Organizing through such sources of information is not, and could not constitutionally be, restricted. But remote organizing of this kind is no substitute, in law or practice, for the human, personal encounter at the worksite between two employees, and this Court has never recognized it to be such a substitute. The Court has reached this result not because self-organizing based on face-to-face employee communication is an undiluted benefit to unions. Rather, the primacy of the face-to-face employee solicitation enacts and reflects important democratic values. In particular, it defines the kind of labor organizations and labor representations that our democracy wants to have: labor organizations that are the creation of their members and that respond to those members' concerns.

For this reason, this Court has consistently accorded protection to the workplace encounter between employees, on nonworking time, imposing restrictions only after carefully balancing the employee's right to speak and associate against the employer's property or managerial interests. Thus, employees may not be disciplined for engaging in

union solicitation on company property, so long as this is during their time, not working time. For example, in *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945), an employee was discharged for passing out applications for union membership during his lunch period; others were discharged for wearing union buttons; while others were suspended for distributing union literature in the company-owned and fenced-in parking lots. This Court enforced the Board's order that all such employees were discriminatorily discharged in violation of what is now §8(a)(3) of the NLRA. As the Court explained, the dominant purpose of the NLRA:

is the right of employees to organize for mutual aid without employer interference. This is the principle of labor relations which the Board is to foster.

324 U.S. at 798.

More recently, this Court enforced the Board's order that the reprimand of a medical technician for distributing a union newsletter at a hospital's cafeteria, largely (though not exclusively) patronized by employees, similarly violated the Act. *Beth Israel Hospital v. NLRB*, 437 U.S. 483 (1978). As the Court wrote:

We have long accepted the Board's view that the right of employees to self-organize and bargain collectively established by §7 of the NLRA, 29 U.S.C. §157, necessarily encompasses the right effectively to communicate with one another regarding self-organization at the jobsite.

Id. at 491 (footnote omitted). So fundamental is the employee's right to engage in organizational activities at the jobsite that this Court has held ineffective purported waivers

of that right by a union:

The place of work is a place uniquely appropriate for dissemination of views concerning the bargaining representative and the various options open to employees Congress declared in Section 1 of the Act that it was the policy of the United States to protect "the exercise of full freedom of association."

NLRB v. Magnavox Co., 415 U.S. 322, 325-26 (1974).

The protection of jobsite, face-to-face solicitation between employees should not be seen as an interest-group payoff to labor unions. Union power would be far more effectively institutionalized through a regime of compulsory representation of employees, but that is not the labor scheme that Congress created in 1935. By contrast, employee self-organizing, the scheme that Congress did create, is risky for unions, as well as employees. The official commission studying our nation's employment laws recently found that illegal firing of union supporters takes place in "one in every four elections, victimizing 1 in 50 union supporters." U.S. Department of Labor and Department of Commerce, Commission on the Future of Worker-Management Relations, *Fact Finding Report 70* (May 1994). This figure does not include discharges, such as the discharge of Malcolm Hansen in the instant case, which the Board found was for his union organizing, but which occurred at a time when no union election was pending.

By building the right to self-organization on the human encounter between two employees, the NLRA enacts powerful democratic constitutional values: democratic participation in industry, freedom of speech, freedom of association, private ordering of the economy, and limited government. This package of values has been largely stable for decades, and should not be undone by this Court without explicit

congressional authorization and over the objections of the agency charged with administering the statute.

Indeed, this Court has never deviated from the fundamental principle that the Act protects face-to-face solicitation at the workplace, between two employees, on the subject of unions. To be sure, this principle is no more absolute than other principles of labor law, and may at times yield to legitimate employer property or managerial interests. For example, the right of hospital employees to talk "union," even on their own time, may be kept out of corridors and sitting rooms near patient care areas. *NLRB v. Baptist Hospital, Inc.*, 442 U.S. 773 (1979). But the Court has never jettisoned a balancing approach that carefully weighs competing interests, in favor of a vague, sweeping, and overbroad exclusion of persons who are plainly employees from the protections of the NLRA.

III. RESPONDENT DISCRIMINATED UNLAWFULLY WHEN IT REFUSED TO HIRE UNION MEMBERS AND WHEN IT DISCHARGED AN EMPLOYEE FOR ACTIVITIES ON BEHALF OF A LABOR ORGANIZATION

Federal labor law takes no position on whether respondent's employees should be represented by a labor organization. That choice is the employees' to make. Federal labor law is not necessarily violated if that job is union, or nonunion. Nothing is more fundamental to federal labor law, however, than the proposition that Town & Country employees have a right to make a choice to accept or reject a union for themselves; that their right to decide their union status involves certain employee rights to engage in jobsite union solicitation; and that the employer may not interfere with these rights absent substantial interests nowhere present

on this record. See Point V, *infra*.

Respondent clearly preferred that its renovation job at the Boise Cascade mill, like its other jobs, be performed nonunion. Respondent's preference is not illegal, and the NLRA protects Town & Country's desire to hold it and express it. Town & Country has the right, for example, to address its employees at any time on the subject of unionization. It may state its preferences against unions, present information about unions, or predict the likely impact of unionization on its business, so long as its remarks do not threaten or coerce. Section 8(c), 29 U.S.C. §158(c); *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969); *NLRB v. Virginia Electric & Power Co.*, 314 U.S. 469 (1941).

What respondent may not do under the NLRA is to decide for itself that a given job will be nonunion, and then prevent employees from hearing about unions, through the combined scissors of discrimination in hiring, followed by the discriminatory discharge of lawfully hired employees once they begin union organizing. No proposition of federal labor law is more fundamental. Permitting an employer to decide unilaterally whether a job will be union or nonunion removes the decision to self-organize from the employees, where Congress -- consistent with its understanding of constitutional values -- definitively placed it sixty years ago.

This Court has repeatedly recognized that §2(3) of the NLRA extends protection to "any employee," other than those specifically listed by Congress as outside the statute. Indeed, the statutory term "employee" must be read to include no exceptions other than those placed there by Congress or constitutionally required. See *NLRB v. The Catholic Bishop of Chicago*, 440 U.S. 490 (1979). As this Court explained in *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177:

To circumscribe the general class, "employees," we must find authority either in the policy of

the Act or in some specific delimiting provision of it.

Not only is the Act devoid of a comprehensive definition of "employee" . . . but the contrary is the fact. The problem of what workers were to be covered by legal remedies for assuring the right of self-organization was a familiar one when Congress formulated the Act. The policy which it expressed in defining "employee" both affirmatively and negatively, as it did in §2(3), had behind it important practical and judicial experience. "The term 'employee,'" the section reads, "shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise" This was not fortuitous phrasing. It has reference to the controversies engendered by constructions placed upon the Clayton Act and kindred state legislation in relation to the functions of workers' organizations and the desire not to repeat those controversies.

Id. at 191-92.

The Court in *Phelps Dodge* thus held that applicants for employment are statutory employees within §2(3), and protected against discrimination. In reaching this result, the Court recognized that "[d]iscrimination against union labor in the hiring of men is a dam to self-organization at the source of supply." 313 U.S. at 185. The Court's holding that job applicants are statutory employees reflects the application of the broader interpretive principle that §2 of the Act should, consistent with constitutional requirements, admit of no exception other than those drafted by Congress.

The treatment in *Phelps Dodge* of job applicants as

"employees" respects three different levels of congressional intent, all equally relevant to the instant case. At the statutory level, it protects those individuals whom Congress intended to protect in enacting the NLRA. At the institutional level, it circumscribes the power of the Court and the Board within the limits of the congressional design. And at the policy level, it goes beyond protecting specific individuals and rather protects Congress' entire plan for employee self-organization.

The Board's Order finding a violation of the Act in this case served the same three fundamental principles. Here, as in *Phelps Dodge*: "*The effect of such discrimination is not confined to the actual denial of employment; it inevitably operates against the whole idea of the legitimacy of organization.*" 313 U.S. at 185 (emphasis added). Furthermore, by finding that respondent's hiring and firing of union members violates the Act, the Board also protected the rights of Town and Country's nonunion employees to make their own choice about unionism and to receive information about unions from fellow employees.

The employees' right to receive information from co-workers about unions is substantially abridged by the decision below. This Court has repeatedly recognized that a "prohibition on compensation unquestionably imposes a significant burden on expressive activity." *U.S. v. National Treasury Employees Union*, __ U.S. __, 63 U.S.L.W. 4133, 4137 (Feb. 22, 1995). See also *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 115 (1991). If employees are to exercise the choice that Congress placed with them, they must have access to information at the workplace from co-workers who favor the union. A prohibition on information from workers who are compensated for their speech activity represents the same kind of burden on expression that this Court recognizes in the constitutional context. This does not mean, of course,

that any conceivable source of information for employees is protected. It does mean, and has meant for a half century, however, that face-to-face solicitation at the workplace is protected unless employers can show, as this employer did not and could not, substantial countervailing interests.

IV. THE COURT OF APPEALS' CONTRARY RULE WOULD CHILL EMPLOYEE RIGHTS

The Eighth Circuit's decision in this case found that none of the victims of Town & Country's discrimination was a statutory "employee": not the applicants who were paid union organizers; not the applicants who were encouraged to apply for nonunion work; and not Hansen, the discharged worker, who later received some reimbursement from the union. Each of these individuals, the court of appeals found, was "under Local 292's control," and therefore not within the Act's protection of "any employee." The lower court's decision thus denies protection to individuals far beyond the stereotyped "paid union organizer." In support of this broad rule of statutory exclusion, the court of appeals provided no test, no standard, and no definition to support what is in effect a gaping hole, ripped without the slightest statutory authorization, into the protective fabric of §2(3) of the Act.

A. A Judicially-Legislated Exception For "Paid Union Organizers" Is Neither Defined In Current Law Or Practice, Self-Defining, Or Easily Defined

The lower court's denial of statutory protection to employees "under the control of the union" has no basis in either the language or legislative history of the NLRA, and has never been employed for this *or any other purpose* by the Board. Indeed, the far narrower term "paid union organizer" has no meaning whatever in labor law. The Board

does not, and need not, define it for any other purpose.

To the contrary, the Board has consistently extended the protections of the Act to employees in the same posture as the employees in this case. While the Board was able to trace such protection only as far back as *Oak Apparel, Inc.*, 218 NLRB 701 (1975), this is assuredly *not* because paid union organizers in the court of appeals' loose sense -- employees and applicants receiving union encouragement -- have not been liberally sprinkled through the Board reports. Rather, such employees were always accepted as statutory employees; their precise arrangements with the unions to which they belonged were of no interest to the Board or litigating parties and no precise findings were made.

Botany Worsted Mills, 4 NLRB 292, 297 (1937), stands out from early Board cases only in that the issue surfaced obliquely. An employee named Joseph Peidl had been employed for about two years when he began organizational work for the union and was discharged. The Board found the discharge to be discriminatory under what is now §8(a)(3) of the NLRA. The employer had alleged to employees that Peidl was being compensated by the union for each member signed up. The employer, however, did not press the point before the Board, and the Board made no findings whether or not Peidl was being paid. Under the Eighth Circuit's approach, if Peidl actually received compensation from the union, the case was wrongly decided. The same might be true if Peidl were simply having certain organizing expenses reimbursed by the union, if the union provided Peidl with small amounts to pick up drinks for employees, or if the union paid bus fare for employees testifying before the Board.

No doubt, if the approach of the court of appeals were permitted to stand, the Board might evolve decisions that, over time, would articulate the quantum of union support

that would render a hapless employee into a nonemployee. The Board, however, would likely undertake this articulation through case-by-case adjudication, and could not be compelled to undertake it by rule-making, *see NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 290-95 (1974) (Board may exclude managerial employees from statutory protection through case-by-case litigation). Under this process, significant organizational activity might be chilled for a substantial period of time under a vague and sweeping rule that has no basis in the statute itself.

B. A Denial Of Protection Would Invite Abuse Of The Hiring Process That This Court Has Condemned In Other Contexts, Including Reliance By Employers On After-Acquired Evidence To Justify Discharge

Respondent refused to interview most of the electricians who applied to work for it because, the Board found, the electricians were union members. The Eighth Circuit set aside this Order, on the ground that the applicants were "under Local 292's control," in the sense that the union might reimburse them for any difference between union wages and Town & Country's, and could also direct the electricians to leave the job. Nothing in the record shows, however, that when Town & Country refused to interview the union members, telling them through its agent that the job was nonunion, it knew about either the possibility of reimbursement or the union's encouragement of these electricians to apply for nonunion work.

This case, then, is in the identical posture as *McKennon v. Nashville Banner Pub. Co.*, ___ U.S. ___, 115 S.Ct. 879, 883-85 (1995), in which the Court made clear that an employer cannot justify discrimination under the Age Discrimination in Employment Act on the basis of after-acquired evidence of employee wrongdoing. There is no

reason for a different result under the NLRA, and for this reason alone the decision of the court of appeals cannot stand. This corresponds not merely to the holding in *McKennon*, but to this Court's express rationale:

The objectives of the ADEA are furthered when even a single employee establishes that an employer has discriminated against him or her. The disclosure through litigation of incidents or practices which violate national policies respecting nondiscrimination in the work force is itself important, for the occurrence of violations may disclose patterns of noncompliance resulting from a misappreciation of the Act's operation or entrenched resistance to its commands, either of which can be of industry-wide significance. The efficacy of its enforcement mechanisms becomes one measure of the success of the Act.

115 S.Ct. at 885. This language applies with even greater force to the discrimination practiced by Town & Country. Unlike the plaintiff in *McKennon* who was suspected of wrongdoing, the discharged individuals here were engaged in statutorily protected activity. Moreover, as in *McKennon*, protecting these employees against discriminatory discharge does more than simply enforce individual rights; it protects the process by which respondent's discriminatory practices come under the light of public scrutiny.

C. Refusing To Accord Protection Would Chill Legitimate Employee Activity That Congress Plainly Meant To Protect

If permitted to stand, the decision below would substantially chill the right to self-organization, a right which Congress intended, under the NLRA and cognate federal labor

laws, to protect against employer retaliation. The Board uses the example, in its brief, of a longtime employee of a nonunion establishment who could lose his status as a statutory employee should he begin organizing, in a way that involved either financial remuneration from a union or placed him in a position which the decision below vaguely termed "under [union] control."

Consider another hypothetical employee who believes himself to be a victim of discrimination under the civil rights laws. He seeks advice from a civil rights organization in which he has been active. They tell him that his employer's treatment of him does indeed appear discriminatory, and they urge him to keep pressing for the promotion which he believes he has been discriminatorily denied. When he expresses concern that he may be fired, they assure him that they will place him on the staff of the civil rights organization if necessary to tide him over.

Under the Eighth Circuit's approach, this innocent exchange would destroy the employee's status as an employee and deprive him of protection against wrongful discrimination. While pressing for the promotion is plainly in the employee's own interest -- as it was in the interest of unemployed electricians to be hired by Town & Country -- it is just as plainly an action taken at the urging of a civil rights organization and includes a promise of financial support, should this be necessary. While the hypothetical civil rights victim has not bound himself to leave his job at the behest of the civil rights organization, he has agreed to a course of conduct that may in fact result in the termination of his employment. But to term this employee "under the control" of the civil rights organization for trying to ensure that enforcement of his legal rights did not result in his financial

ruin would turn the civil rights laws on their head.⁴

The Eighth Circuit did not specify the precise nature and limits of the hole that it tore into the NLRA. Perhaps it meant to create a test under which the Act's protection depends on the motive under which an employee applies for a job. A motivational test is of course nowhere present in the statute that Congress enacted. Such an approach, moreover, would invite endless litigation on the subjective motivation of employee job applicants.

V. The Employer's Asserted Interests In Discriminating Against The Affected Individuals Lack Legitimacy

This Court has repeatedly recognized that the employee's right to self-organize and to receive information about unions must be balanced against the legitimate property and managerial interests of the employer. Thus, in *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105 (1956), this Court found that, although "[t]he right of self-organization depends in some measure on the ability of employees to learn the advantages of self-organization from others," an employer may nevertheless bar nonemployee organizers from trespass on company property. *Id.* at 113 (1956); *see also Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992).

In this case, Town & Country has advanced no property right that would warrant its discriminatory hiring and firing

⁴ Because many civil rights laws are designed to protect the rights of "employees," the implications of the Eighth Circuit's reasoning are potentially far-reaching. For example, federal law protects "employees" in the workplace from sexual harassment, unsafe working conditions, and the use of polygraphs. Although Congress has not defined the term "employee" in precisely the same fashion in every statute, the definition of the term "employee" under the NLRA is as broad as any.

of union members. Indeed, establishing such a property right would be difficult, since the employer was hiring workers to perform renovation work on someone else's property. Town & Country nevertheless argues that this Court's decisions in *Babcock* and *Lechmere* give it an absolute right to exclude union organizers from a job site, even when no property interest is implicated and exclusion would interfere with the employees' right to receive information about unions. The unions in *Babcock* and *Lechmere* sought the right to trespass on private property. In the present case, however, the union member-applicants did not seek the right to infringe any legal right of the employer, much less a license to violate the criminal law. All they sought was the right to be treated on par with nonunion members when they applied for a job for which they were qualified. This request is not even remotely comparable to that made in *Babcock* and *Lechmere*.

The employers' conduct in *Babcock* and *Lechmere* was also completely different from that of respondent. The employers in those cases did not discriminate against unions or their message. They merely applied a neutral rule against solicitation on company property to all outside organizations, regardless of their interests or message. Town & Country, by contrast, claims the right to discriminate against anyone who might speak favorably about unions. The right of the employers in *Babcock* and *Lechmere* to enforce a neutral rule against solicitation in no way creates a right for Town & Country to discriminate against those who carry a message about unions that respondent dislikes.

Moreover, Town & Country's *per se* rule of exclusion for employees who receive some kind of support from the union simply jettisons the careful balancing approach that this Court endorsed in *Babcock* and *Lechmere*. This balancing process is essential, as this Court has consistently recognized in a wide variety of contexts. By attempting to re-

move complainants from the statutory definition of employee, Town & Country is attempting to avoid the balancing of interests that both *Babcock* and *Lechmere* require.

Nor can respondent point to any legitimate managerial interest in avoiding union organizers or supporters as employees. The Eighth Circuit expressed concern that union organizers and supporters would not function as good employees. Certainly if this turned out to be the case, they may lawfully be fired, as the Board has not hesitated to hold. *Sears, Roebuck & Co.*, 170 NLRB 533 (1968)(no violation of NLRA to discharge union organizer for economic reasons). The Board found, however, that union organizers are generally good employees, for "engaging in conduct warranting discharge would be antithetical to their objective" of organizing the employer. 309 NLRB at 1257. While social science evidence on the job behavior of union organizers is probably unavailable, the Board's assessment, which is at least rational, is in fact closer to the unvarying accounts by organizers themselves:

I got Essie into the union. When she saw that I really wasn't a slacker and that I would keep up my end I won her respect. You had to *earn* the respect of your fellow workers or you couldn't talk to them about new ideas, or unions, etc. You always had to be a good worker.

Union organizer Stella Nowicki, describing her experiences at Swift's in Chicago in the 1930s, in RANK AND FILE: PERSONAL HISTORIES BY WORKING-CLASS ORGANIZERS 82 (Alice & Staughton Lynd eds., 2d ed. 1981).

The decision below further suggested that hiring individuals who might leave employment at the behest of a union interfered with respondent's managerial interest, because an employer "should not be required to place and re-

tain on its payroll those whose continued presence on the job will be determined by an entity other than itself." Of course, this did not happen in this case and, as with all matters concerning the applicants' arrangements with the union, cannot be shown to have been known to Town & Country at the time of its discriminatory refusal to interview. Certainly in the form put by the court of appeals, the proposition is too broad. For example, one is not less an employee if one has agreed in advance that one will quit a job, should the need arise, at the request of one's spouse or ailing parent.

Likewise, the employer's managerial interest in this case was jeopardized only if union organizing and union association are antithetical to the employer's running of his own business. But, it is precisely this premise that Congress and this Court have explicitly and repeatedly rejected. As the Board put it:

The statute is founded on the belief that an employee may legitimately give allegiance to both a union and an employer. To the extent that may appear to give rise to a conflict, it is a conflict that was resolved by Congress long since in favor of the right of employees to organize.

309 NLRB at 1257.

It may be argued that employers nevertheless have a right to insist on "loyalty" that paid union organizers cannot give. This proposition cannot, however, be easily translated into labor law as this Court has developed it. In particular, "loyalty" is a term of art in labor law, used by this Court in two precise meanings. First, "loyalty" is what characterizes managers and supervisors who are not employees. Because employers may expect "loyalty" from some managerial personnel, they are not employees and may be kept from bargaining through unions. *NLRB v. Yeshiva University*, 444

U.S. 672 (1980). Employees, by definition and in contrast with managers, do not have this duty of loyalty that precludes bargaining through unions. Second, statutory employees have a much narrower duty of loyalty that precludes participation in certain unprotected tactics, specifically, public disparagement of the employer's product. *NLRB v. Local 1229, IBEW*, 346 U.S. 464 (1953). The court of appeals did not use "loyalty" in either of these accepted meanings, and its addition of a new and unprecedented meaning to "loyalty" could reduce the whole structure of labor law to incoherence.

In the end, the sole interest of Town & Country in excluding union sympathizers -- whether paid organizers, "salted" applicants, or reimbursed staff -- is its desire to remain nonunion. This is a legitimate desire when the issue is a speech to employees, or other rational persuasion. It is not, and has not been since 1935, a legitimate reason for discrimination in hire or discharge. A contrary holding would remove the decision whether or not to unionize from the employees in whom Congress vested it, to the employers who exercised that decision before 1935. This Court, however, should have some reason to reject sixty years of labor law other than the fact that some employers would prefer to remain nonunion.

CONCLUSION

For the reasons stated above, *amicus* urges this Court to reverse the judgment of the decision below, and to order enforcement of the Board's Order.

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IN THE
Supreme Court Of The United States
OCTOBER TERM, 1994

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

TOWN & COUNTRY ELECTRIC, INC.
and
AMERISTAFF PERSONNEL CONTRACTORS, LTD,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals for
the Eighth Circuit

**BRIEF OF AMICI CURIAE ASSOCIATED BUILDERS AND
CONTRACTORS, INC., THE NATIONAL
ASSOCIATION OF MANUFACTURERS,
INTERNATIONAL MASS RETAIL ASSOCIATION, AND
INDEPENDENT ELECTRICAL CONTRACTORS, INC.
IN SUPPORT OF RESPONDENTS**

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INTEREST OF AMICI CURIAE¹

This brief is being filed jointly on behalf of four diverse trade associations, representing large segments of the business community, who are deeply concerned about the effects on employers of the National Labor Relations Board's misguided policy on "salting."²

Associated Builders and Contractors, Inc.(ABC) is a national construction industry trade association of more than 17,000 contractors, suppliers and related firms who share the belief that all work should be awarded and performed on the basis of merit, based upon free and open competition, and regardless of labor affiliation. Respondent Town & Country Electric, Inc. is a member of ABC. Other ABC members include H.B. Zachry Co. and Willmar Electric Service, Inc., who have confronted the same issue presented by this case in previous litigation which has been cited to the Court. *See H.B. Zachry Co. v. NLRB*, 886 F. 2d 70 (4th Cir. 1989); *Willmar Electric Service, Inc. v. NLRB*, 968 F. 2d 1327 (D.C. Cir. 1992), *cert. den.* __ U.S. __, 113 S. Ct. 1252 (1993). ABC participated as an amicus before the National Labor Relations Board in connection with the Board's consideration of the present case below.

The National Association of Manufacturers of the United States of America ("NAM"), which is also participating in this brief as amicus curiae, is the nation's oldest and largest broad-based industrial trade association. Its more than 13,000 member companies and subsidiaries, including 9,000 small manufacturers, employ approximately eighty five percent of all manufacturing workers and produce over eighty percent of the nation's

¹ Letters of consent to the filing of this brief have been filed with the Clerk of the Court pursuant to Court Rule 37.3

² The term "salting," as used here and in the decision of the court of appeals below, refers to the practice of paid union organizers posing as applicants for employment or as employees of an employer whom they are seeking to organize as agents of the union.

manufactured goods. More than 158,000 additional businesses are affiliated with the NAM through its Associations Council and National Industrial Council.

The NAM and its councils are vitally interested in ensuring that federal laws relating to employee relations are enforced reasonably and fairly, so as not to impair the ability of manufacturers to compete in the world market. To this end, the NAM has filed briefs in a variety of cases involving employee relations issues, including *Willmar Electric Service, Inc. v. NLRB*, 968 F.2d 1327 (D.C. Cir. 1992), cert. den. ___ U.S. ___, 113 S. Ct. 1252 (1993).

The International Mass Retail Association (IMRA) represents 170 mass retail chains that include full-line and specialty discount stores, home centers, catalogue showrooms, dollar stores, variety stores, warehouse clubs, deep discount drugstores and off-price stores. Collectively IMRA retail members operate more than 54,000 stores in the U.S. and abroad and employ well over a million people. IMRA's members represent the overwhelming majority of the approximately \$245 billion mass retail industry. IMRA is deeply concerned that labor law is interpreted and enforced in ways that do not infringe on the rights of employers to operate their businesses. IMRA has participated as an amicus in, among other cases, *Lechmere, Inc. v. NLRB*, ___ U.S. ___, 112 S. Ct. 841 (1992).

Independent Electrical Contractors, Inc. is a national trade association comprising 2,000 electrical contractors. Respondent Town & Country Electric, Inc. is one of IEC's larger members. Many of IEC's other members are small, family owned businesses who lack the financial resources to protect themselves against the types of union activity at issue in this case. IEC members believe that their employees should have the freedom to make their own determinations whether or not to seek union representation. IEC members do not believe, however, that they should be forced to hire outside, paid professional

union organizers, whose purpose in seeking employment is to serve the adversarial interest of a union, often to the detriment of the employer.

Members of ABC, NAM, IMRA, IEC (hereafter the Joint Amici) and other business groups have been unfairly targeted by labor organizations, including the intervenor International Brotherhood of Electrical Workers and the amicus International Brotherhood of Boilermakers, with the widespread use of "salting" tactics and the filing of hundreds of unfair labor practice charges on a nationwide basis. The Joint Amici each strongly support the right of bona fide employees and employee applicants to engage in concerted, protected activity within the meaning of the National Labor Relations Act or to refrain from such activity. The policies of the National Labor Relations Board with regard to paid, professional union organizers, however, have led to a gross abrogation of the rights of employers to select bona fide employees who are not paid agents of an outside organization bearing an inherent conflict of interest.

This important issue is by no means limited to the construction industry. The Joint Amici are jointly filing this brief so that the Court understands that this issue is of great significance to employers in a wide variety of industries, many of whom have received, or may receive in the future, applications from paid, professional employees of outside labor organizations, pursuant to the Board's misguided policy. The Joint Amici believe that employers should not be required to treat paid, professional union organizers as if they are bona fide applicants for employment, when they clearly are not.

The Joint Amici are filing this brief in support of the Respondent and ask that the decision of the Eighth Circuit (and the similar analysis of the Fourth Circuit) be upheld in all respects. The Court of Appeals has properly harmonized the Act with settled common law principles of employment. By contrast, the policies advocated by the Board ignore the realities

of the workplace and unacceptably blur the distinction between bona fide employees and outside union agents. As is further explained below, this Court should therefore hold that paid, professional union organizers are not "employees" within the meaning of the Act.

SUMMARY OF ARGUMENT

The Board's policy on "salting" is inconsistent with this Court's long recognized distinction between bona fide employees and non-employee outside union agents. *Lechmere, Inc. v. NLRB*, __ U.S. __, 112 S. Ct. 841 (1992). Contrary to the Petitioner's arguments, the Act itself excludes employees of labor organizations from the statutorily protected definition of "employees" (or employee applicants). See 29 U.S.C. §§ 152(2) and 152(3). The Board's distorted view of the Act's legislative history and plain language undermines the entire rationale for the agency's "salting" policy.

By contrast, the Court of Appeals' analysis is logically consistent and conforms the statutory definition of employees with long accepted traditions of common law agency in the workplace. See *Restatement of Agency (Second)* (1957); *Nationwide Mutual Ins. v. Darden*, __ U.S. __, 112 S. Ct. 1344 (1992). An employee of a labor organization who purports to seek employment with a business in order to serve the union's organizational objectives bears an unavoidable conflict of interest. The regulated conflict between organized labor and management is central to the Act, and it is wrong to compel employers to hire union agents who inherently serve a different master. See also *NLRB v. Bell Aerospace Co.*, 416 U.S. 267 (1974).

The Board has confused the issue by asserting that the holding of the court of appeals somehow jeopardizes the organizational rights of bona fide employees. The conflict of interest does not arise from an employee's desire to support a union, but

only arises if an individual is *employed* by the union as its paid, controlled agent.

Finally, the Board's policy has led to preposterous and unfair results. There is widespread disbelief in the employer community that any policy can be consistent with the Act which requires employers to hire paid union agents bent on organizing their businesses. The Board's policy has led to substantial abuse of unfair labor practice procedures and the perception that the weight of government action now supports union access to private workplaces, in a manner which had previously been declared to be inconsistent with the Act. This Court's intervention is urgently required to prevent further enforcement of the Board's misguided policy.

ARGUMENT

I. THE BOARD'S POLICY ON "SALTING" IGNORES THE SETTLED DISTINCTION BETWEEN THE PROTECTED RIGHTS OF BONA FIDE "EMPLOYEES" AND THE UNPROTECTED DEMANDS OF NON-EMPLOYEE AGENTS OF OUTSIDE LABOR ORGANIZATIONS.

This Court has long recognized a distinction between the rights of bona fide employees to engage in concerted, protected activity, and the unprotected demands for access to the workplace by non-employee union organizers. In *Lechmere, Inc. v. NLRB*, ___ U.S. ___, 112 S. Ct. 841, 845 (1992), the Court held that employers were entitled to refuse to permit non-employee union organizers onto private property. As the Court stated: "By its plain terms,...the NLRA confers rights only on employees, not on unions or their nonemployee organizers." See also *NLRB v. Babcock & Wilcox*, 351 U.S. 105, 113 (1956).

The practice of "salting" which is at issue in the present case constitutes nothing less than an attempt by non-employee union organizers to evade the holdings of *Lechmere* and *Babcock & Wilcox*.³ By posing as "employees" (or employee applicants), the unions' paid, professional agents are seeking to gain otherwise prohibited access to the workplace. The National Labor Relations Board's rulings have permitted the unions to achieve their objective by reading out of the Act the settled distinction between bona fide employee applicants and non-em-

³ See also *Central Hardware Co. v. NLRB*, 439 F. 2d 1321, 1328 (8th Cir. 1971), *rev'd on other grounds*, 407 U.S. 539 (1972), cited in *Lechmere*. In *Central Hardware*, a non-employee union organizer posed as a "customer," claiming invitee rights of access to the employer's store. The court of appeals properly rejected the union's claim stating: "The company had the right to bar [the union agent] from the store; he was not a bona fide customer...."

ployee union agents. The Board's policy is at odds with the history and purpose of the Act and the holdings of this Court.⁴

Citing only the Act's broad definition of "employee" status and inapposite case law, the Petitioner briefs have begged the question as to the separation between employees and non-employee union agents. Cases dealing with employee applicants in general (*Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 181-188 (1941)) or aliens (*Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 891 (1984)) or supervisors (*NLRB v. Hearst Publications, Inc.*, 322 U.S. 111, 130 (1944)) say nothing with regard to the plain statutory distinction between employees and outside organizers.

On the other hand, Congress's intent to treat paid employees of labor organizations differently from bona fide employees or employee applicants is confirmed by Section 2(2) of the Act, 29 U.S.C. 152(2), when read in *pari materia* with Section 2(3),

⁴ The Amicus ACLU, and to a lesser extent the Board, has attempted to distinguish *Lechmere* and *Babcock* on the grounds that the employers in those cases sought to apply a neutral rule against solicitation by all outside organizations, whereas Town & Country supposedly "claims the right to discriminate against anyone who might speak favorably about unions." ACLU Brief at 22. The ACLU argument falsely characterizes both *Lechmere* and the present case. In *Lechmere*, this Court correctly authorized employers to distinguish between bona fide employees, who were entitled to solicit on company property, and outside, non-employee union organizers, who could be lawfully denied access. Here, Town & Country has not claimed any right to discriminate against anyone based on their "speech" in support of union activities. The employer has merely limited its invitations for employment (access) to bona fide employee applicants, *i.e.*, those who do not seek to remain employed by an outside labor organization with an inherent conflict of interest, and the company has properly denied access (employment) to outside union organizers, *i.e.*, those applicants who seek to remain employed by an adversarial labor organization. There is no contention here that Town & Country has offered employment to any other agents of outside, adverse organizations who have expressed a similar intention to continue serving the interests of that other employer while purporting to work for the company. Thus, there has been no discrimination by Town & Country in any manner prohibited by *Lechmere*.

29 U.S.C. 152(3). Section 2(3) excludes from the definition of "employee" any individual employed "by any ... person who is not an employer as herein defined [in Section 2(2)]". Section 2(2) plainly states that the term "employer," "shall not include ... any labor organization (other than when acting as an employer)...."

Thus, contrary to Petitioners' claims, Congress has spoken directly to the issue now before the Court. Consistent with the holding of *Lechmere*, Congress never intended for paid employees of unions to be able to claim the protections of the Act when seeking employment for the purpose of organizing an "employer," all the while maintaining their status as paid, professional employees of their union.

Congress was well aware of the distinction between a union's relationship with its own employees regarding their own wages, hours, and terms and conditions of employment and the union's employment of such individuals in the capacity of professional organizers, seeking to organize the true "employees" of "employers" within the meaning of the Act. See S. Rep. No. 573, 74th Cong. 1st Sess. 6 (1934) reprinted in 2 Legislative History of the National Labor Relations Act 2300, 2305 (1935). See also S. Rep. No. 1184, 74th Cong., 2d Sess. 4 (1934), reprinted in 1 Legislative History of the National Labor Relations Act 1099, 1102 (1935) (distinguishing between a union's relations with its "clerks, secretaries and the like" and its actions as an advocate of unionization).

In the present case and others like it, the Board's distorted view of the Act's legislative history has undermined its entire policy on "salting," causing it to force employers into the untenable position of treating outside union agents as if they are no different from bona fide employees or employee applicants.⁵

⁵ The Petitioners have erroneously stated that there is "no difference" between the types of activities which a paid union agent may engage in and the type of conduct which may be engaged in by a bona fide employee who

For this reason, the Court of Appeals properly denied enforcement of the Board's order, and the court's decision should be upheld.

II. ONLY THE COURT OF APPEALS' ANALYSIS PROPERLY APPLIES COMMON LAW DEFINITIONS OF EMPLOYEE STATUS.

Not only was the Court of Appeals correct in finding the Board's interpretation of the Act to be unreasonable, but the court's own analysis is also compelled by long accepted common law (and common sense) understandings of employee status in the workplace. As this Court held in *Nationwide Mutual Ins. Co. v. Darden*, __ U.S. __, 112 S. Ct. 1344, 1348 (1992), Congress intended in the NLRA to "describe the conventional master-servant relationship as understood by common-law agency doctrine." The Board's holding is utterly inconsistent with settled principles of agency, as the Court of Appeals properly found, because the Board would ignore the plain conflict of interest which precludes a paid union agent from serving two masters.

Under common law, an agent has a duty to act solely for the benefit of his principal. The Restatement (Second) of Agency at § 394 (1957) specifically precludes an agent from acting on behalf of a person whose interests conflict with those of the principal in matters in which the agent is employed. Therefore, a person cannot be the servant to two masters at one time if service to one involves abandonment of or conflict with service to the other. *Id.* at § 226. Nor is a prospective employer required to accept an applicant's promise to somehow overcome such inherent conflicts. The employer has the right to exercise

happens to support unionization. Pet. App. 28a; Brief of Petitioner NLRB at 24. In reality, however, the difference is fundamental: The bona fide employee has a statutorily protected right to engage in pro-union activities while working for an employer, while the outside, paid union agent has no right to force himself into a resisting employers workplace. *Lechmere, Inc. v. NLRB*, *supra*, 112 S. Ct. at 845.

control over its workplace so as to *avoid* employing individuals who seek to continue simultaneous service for conflicting employers. *Id.* at comment a.⁶

In its attempt to avoid the clear mandate of these settled agency principles, the Board has constructed an elaborate fiction, asserting in the face of decades of labor law that unions do not have a conflict of interest with employers. Pet. App. 37a; NLRB Brief at 23-30. In addition, the Board has once again confused the protected right of bona fide employees to engage in protected activity, which is not at issue here, with the inherent conflict of interest presented by a paid *employee of a labor organization* who seeks employment with an employer whom he is being paid by the union to organize.

From the earliest days of the drafting and passage of the Wagner Act to the present, American labor law has been designed to regulate and control organized labor and management as "separate factions in warring camps." *Packard Motor Car Co. v. NLRB*, 330 U.S. 485, 494 (Douglas, J. dissenting)(1947), quoted with approval in *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 278 (1974). Recognition of the fundamentally separate interests of organized labor and management has been in many ways central to the structure of the Act, as this Court has

⁶ Individual Board members have long recognized that these common law agency principles conflict with the notion of treating paid union organizers as bona fide "employees" under the Act. See *Oak Apparel, Inc.*, 218 NLRB 701, 702 (1975)(Kennedy, dissenting)("I personally have great difficulty in understanding how an individual can be an employee of two different employers at the same time for the same working hours. There is a certain master-servant relationship which is absent under such circumstances."). Numerous commentators have also recognized the inconsistency between the Board's salting policy and the common law. See Adams, Conflict of Interest of Bona Fide Employees: The Status of Paid Union Organizers, Lab. L.J. 98, 103-4 (Feb. 1995); Howe, To Be or Not Be An Employee: That is the Question of Salting, 3:2 Geo. Mason Ind. L. Rev. 1 (1995); Northrup, Salting the Contractors Labor Force: Construction Unions Organizing With NLRB Assistance, XIV J. Lab. Res. 469 (Fall, 1993).

repeatedly held. *NLRB v. Bell Aerospace Co.*, *supra*⁷; *Lechmere, Inc. v. NLRB*, *supra*. It is incredible that the Board would at this late date attempt to ignore the statutory conflict of interests between labor organizations and employers.

The Board has repeatedly confused the issue in this case by claiming that recognition of the conflict of interests between unions and employers somehow deprives true employees of their rights to engage in union organizing. Thus, the Board states: "[A] worker for hire does not surrender his status as an 'employee' by engaging in union organizing" (NLRB Brief at 17). This statement is true only if the worker is an "employee" in the first place, i.e., only if he is not a paid, professional agent of an outside labor organization who inherently is subject to an irreconcilable conflict of interest.

Put another way, bona fide employees do not have a conflict of interest when they seek to organize themselves or support union activities, because they are not "employed" by a union to engage in such conduct. Rather, they engage in such activities for their own "mutual aid and protection," as expressly protected by Section 7 of the Act. Outside union agents who seek to organize a workplace, on the other hand, are serving only

⁷ This Court's decision in *NLRB v. Bell Aerospace Co.*, *supra*, is oddly not mentioned in the Board's brief, yet it holds many important lessons for the outcome of the present case. There as here, the Court dealt with a category of workers, "managerial employees," which the Board had determined to be included within the definition of "employee," largely because they had not been expressly excluded from the statutory definition. The Court examined the inherent conflict of interest which would result from including managers in the employee definition and noted previous congressional reversals of Board rulings which had blurred the distinction between labor and management, quoting at length from Justice Douglas's dissent in *Packard Motor Car Co. v. NLRB*, *supra*. The Court in *Bell Aerospace* further observed: "[I]t would also be appropriate for the Board to exclude employees from a unit on the ground that their participation in a labor organization would create a conflict of interest with their job responsibilities." 416 U.S. at 290, n.20.

the interests of their true employer, the union, in a manner not covered by Section 7, and in a manner which clearly conflicts with any claim of bona fide employee status.⁸

Again, the Court of Appeals stated the issue properly:

Were this a case involving a typical job applicant, we might well agree that an employee may be simultaneously loyal to his union and to his nonunion employer. The two union organizers, however, were not typical applicants. They were not in search of a job; they already had one.

Pet. App. at 9a. See also *Ultrasystems Western Constructors, Inc. v. NLRB*, 18 F. 3d 251, 254 (4th Cir. 1994); *H.B. Zachry Co. v. NLRB*, 886 F. 2d 70, 74(4th Cir. 1989).⁹

For similar reasons, the Court of Appeals has also correctly held that job applicants are not bona fide "employees" where they are subject to the union's control in the form of the salting resolution set forth in the present record. Again, it is not a question of the applicant's motivation but of their employment status. The degree of control exercised by the union over these

⁸ The Boilermakers Union, as an amicus in support of the Board, incorrectly states that the court of appeals analysis rests on questions of "motivation." (Amicus Br. at 5-20). To the contrary, the court's holding rests solely on the readily definable *status* of the individual: bona fide employees of an employer who engage in union activity are protected by the Act; outside union agents who are employees of a labor organization cannot also be bona fide employees of the employer and hence are not entitled to the protections of Section 7 of the Act.

⁹ It is disingenuous for the Board to pretend that no conflict of interest exists when a paid union organizer applies for a job with a non-union company, while at the same time the Board has acknowledged that a conflict does exist when the paid organizer applies for work as a striker replacement. *Sunland Const. Co., Inc.*, 309 NLRB 1224, 1230-1231 (1992). Employees have a protected Section 7 right to strike, just as they have the right to organize. It is much more logical and consistent to say, as the Court of Appeals has done, that in either case the paid union organizer has *no* protected rights because he is not a bona fide "employee."

individuals clearly renders them employees or agents of the union and disqualifies them from acting as bona fide employees of the employer to whom they have ostensibly applied for work.

The Court of Appeals' analysis, unlike that of the Board, is logically consistent and leads to understandable, fair results based on well established concepts of agency in the master and servant context. The court's decision should be upheld accordingly.

III. THE BOARD'S INTERPRETATION OF THE ACT HAS LED TO UNFAIR RESULTS WHICH IGNORE THE REALITIES OF THE WORKPLACE AND ARE INCONSISTENT WITH THE POLICIES UNDERLYING THE NATIONAL LABOR RELATIONS ACT.

As a result of the Board's misguided policy on "salting", there are now huge numbers of unfair labor practice charges pending throughout the country involving paid union organizers. Report of the General Counsel (NLRB 1994). The number of charges has continued to increase, not only because of the unions' concerted efforts to exploit the Board's rulings in their favor, but also because the Board's pronouncements are viewed as unfair and counter-intuitive by the vast majority of employers. Employers simply cannot believe the notion that they can be forced to hire professional union agents, who will be paid by and remain under the control of the union.

Some employers, who have hired the unions' paid agents solely in order to avoid unfair labor practice charges, have been equally frustrated, as the union professionals have been trained to provoke disciplinary actions or discharges so that new charges can be filed. Pet. App. 9a. Union leaders have frankly stated that their ultimate objective in the "salting" programs is to force non-union employers to increase their costs by hiring lawyers to defend against increased unfair labor practice charges.¹⁰

¹⁰ See Northrup, *Salting the Contractors Labor Force: Construction Unions Organizing with NLRB Assistance*, XIV J. Lab. Res. 469, 479 (Fall,

The present ongoing abuse of Board processes must not be allowed to continue. Intervention by this Court is necessary to uphold the opinion of the Court of Appeals and to correct the misguided holdings of the Board. The Board's "salting" policy ignores the realities of the workplace and defies common sense, and should be denied enforcement.

IV. Conclusion

For the reasons stated above and in the Respondent's Brief, the decision of the Court of Appeals should be affirmed and the order of the Board should be denied enforcement.

Respectfully submitted,

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1993): "[S]alters are often not interested in permanent employment. Rather they frequently are devoted to harassment, destruction of productivity, or even ... elimination of the company itself unless it changes its ways and agrees to unionization."

IN THE
Supreme Court of the United States

OCTOBER TERM, 1994

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

TOWN & COUNTRY ELECTRIC, INC., and AMERISTAFF
PERSONNEL CONTRACTORS, LTD.,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Eighth Circuit

BRIEF *AMICUS CURIAE* OF THE
LABOR POLICY ASSOCIATION
IN SUPPORT OF THE RESPONDENTS

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

No. 94-947

NATIONAL LABOR RELATIONS BOARD,
v. *Petitioner,*

TOWN & COUNTRY ELECTRIC, INC., and AMERISTAFF
PERSONNEL CONTRACTORS, LTD.,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Eighth Circuit

**BRIEF *AMICUS CURIAE* OF THE
LABOR POLICY ASSOCIATION
IN SUPPORT OF THE RESPONDENTS**

The Labor Policy Association (LPA) respectfully submits this brief *amicus curiae* with the written consent of the parties.¹ The brief urges this Court to affirm the holding of the court of appeals below that paid union organizers and members who, acting under their union's direction and control and in return for valuable monetary consideration from the union, sought positions with a nonunion employer in order to engage in organizing and pursue other union objectives vis-a-vis the targeted employer, were not "employees" within the protection of the

¹ Letters of consent have been filed with the Clerk of the Court.

National Labor Relations Act. Thus, the brief supports the position of the Respondents, Town & Country Electric, Inc., and Ameristaff Personnel Contractors, Ltd., before this Court.

INTEREST OF THE *AMICUS CURIAE*

The Labor Policy Association (LPA) is an organization of more than 220 of the nation's largest private sector employers. Since its founding in 1939, LPA has been concerned exclusively with the development and implementation of laws and public policies relating to employment and labor relations. Its mission is to ensure that laws and policies affecting human resource practices in the private sector are sound, practical, and responsive to the realities of the modern workplace.

LPA's member companies have been at the forefront of efforts to move beyond the tooth-and-claw tactics that too often have characterized worker-management relations in this country, and to achieve greater employee involvement in, and cooperation with, management in both union-represented and nonunion workplaces. At a time when these cooperative efforts have begun to show significant, positive results, LPA members view with serious concern the reversion by some labor unions to the adversarial approach reflected in the practice known as "salting," which lies at the heart of the controversy in this case.²

² The recent growth and current extent of "salting" programs are discussed by Dr. Herbert R. Northrup of the Wharton School, University of Pennsylvania, in a study entitled "Salting the Contractors' Labor Force: Construction Unions Organizing with NLRB Assistance," 14 *Journal of Labor Research* 469 (1993).

Combining elements of espionage, provocation, entrapment, and harassment, union salting programs such as the one involved in this case represent a regression to the most primitive means of pursuing union goals. The participants in the salting program in this case were paid by their union to infiltrate a nonunion employer's work force. They made a commitment to the union, enforceable on pain of discipline, that once they had secured jobs with the targeted employer, they would use those positions to carry out union objectives that were plainly at odds with the employer's interests, and that they would abandon the jobs and the employer immediately whenever the union so directed them.

By holding, in this and other cases, that paid participants in such union salting programs are "employees" entitled under the National Labor Relations Act ("Act") to protection against discharge or denial of employment by the employers they have targeted in their schemes, the National Labor Relations Board ("NLRB") has stripped any concept of loyalty or faithfulness to one's employer from the meaning of the term "employee" under the Act.

LPA members are concerned that such NLRB holdings—and their implicit approval of union salting programs—promote a view of employment that not only is at odds with the traditional legal concept of employment, but is incompatible with the more cooperative relationships that U.S. employers, workers, and worker representatives must achieve if America is to maintain its position in an increasingly competitive global economy.³ Accordingly, as

³ See generally Edward E. Potter and Judith A. Youngman, *Keeping America Competitive: Employment Policy for the Twenty-First Century* (1994).

employers of over 11 million Americans, LPA's member companies have a significant interest in the issues presented for the Court's consideration in this case.

STATEMENT OF THE CASE

The facts are set forth in the brief of the Respondents. The key facts relevant to the issues addressed in this brief *amicus curiae* may be summarized as follows:

This case involves paid organizers and members of the International Brotherhood of Electrical Workers (IBEW) who sought positions with a nonunion electrical contractor, Town & Country Electric, Inc., pursuant to a program the IBEW calls its "salting" program. The union normally prohibits its members from taking jobs with nonunion contractors, but under the salting program, it encourages and pays professional organizers and other members to seek and accept positions with nonunion firms that the union has targeted for organizing or other activities in pursuit of union objectives. Participants in this program—known as "salts" in the union's parlance—are subject to a number of requirements set out in the union's "Job Salting Organizing Resolution."⁴

Under the resolution, salts are obligated to treat "organizing the unorganized" as their "first obligation."⁵ They are required to report to the union's

⁴ The court of appeals noted that the union members involved in this case "were subject to [IBEW] Local 292's job salting organizing resolution." *Town & Country Elec., Inc. v. NLRB*, 34 F.3d 625, 629 (8th Cir. 1994). The text of that resolution is set forth in full in the administrative law judge's decision in *Waco, Inc.*, 316 NLRB No. 9, slip op. at 5 (January 23, 1995).

⁵ *Id.*

business manager for assignment to a targeted employer. If and when they secure positions with a nonunion firm, they are required to "promptly and diligently carry out their organizing assignments, and leave the employer or job immediately upon notification."⁶ For the time they spend in the nonunion employer's work force, the union pays its salted agents the difference between union scale and the targeted employer's wage rates, as well as an allowance for travel expenses.

Lest there be any doubt about the binding nature of the requirements it imposes on participants, the union's job salting resolution concludes by stating that:

[A]ny member accepting employment by a non-signatory [*i.e.*, nonunion] employer, except as authorized by this RESOLUTION, shall be subject to charges and discipline as provided by our Constitution and By-laws.⁷

The IBEW targeted Town & Country for salting in accordance with this program after learning that the company was seeking journeymen electricians for a project at a Boise Cascade paper mill in International Falls, Minnesota. At the union's direction or encouragement, about a dozen of its members, including two full-time IBEW officials, presented themselves at a Minneapolis hotel where Town & Country had arranged to interview applicants. Only one of these individuals—a Malcolm Hansen—was hired for the Boise Cascade project.⁸ Hansen dutifully began

⁶ *Id.*

⁷ *Id.*

⁸ Technically, Hansen was placed on the payroll of Ameristaff Personnel Contractors, Ltd., a staffing services firm that

organizing efforts as soon as he arrived at the job-site, and he was discharged within a few days. He was paid more by the union than by the Respondents for his efforts at the Boise Cascade project site.

The NLRB found that the Respondents fired Hansen because of his union activities, rejecting their claim that he had carried on those efforts during working time in violation of company rules. The Board also found that the full-time organizers and other IBEW members who attempted to salt Town & Country's work force were denied interviews because of their union affiliation. And, because it concluded that those individuals all were "employees" within the protection of the National Labor Relations Act, the Board held that the Respondent's actions violated Sections 8(a)(1) and (3) of the Act. 29 U.S.C. § 158(a)(1) and (3) (Supp. 1995).

On review, the Eighth Circuit denied enforcement of the Board's order. It concluded that the paid union organizers and other salted IBEW agents involved in this case were not "employees" entitled to the Act's protection. Following decisions of the Fourth and Sixth Circuits, and applying traditional principles of agency law, the court of appeals noted that "an agent is subject to a duty not to act on behalf of a person or entity whose interests conflict with those of the principal in the matters in which the agent is employed."⁹

The Eighth Circuit found it significant that the full-time IBEW organizers in this case sought posi-

Town & Country had engaged to help it recruit electricians for the project.

⁹ *Town & Country Elec., Inc.*, 34 F.3d at 628.

tions with Town & Country only to advance the union's interests.¹⁰ Similarly, the court noted that the other salts, in applying for the positions, acted under the union's direction and control—as exemplified by their commitment to carry out the assignments the union had given them and to leave the targeted employer immediately whenever the union so instructed.¹¹ In the court's view, the union's control over the salted agents, and particularly over their continued presence on the jobs, precluded finding them to be true "employees."¹²

SUMMARY OF ARGUMENT

The court of appeals' conclusion that the salts in this case were not "employees" within the meaning of the National Labor Relations Act accords not only with well-established principles of statutory construction and common-law concepts of employment, but also with sound public policy. Thus, since the Act "confers rights only on *employees*, not on unions or their nonemployee organizers," *Lechmere, Inc. v. NLRB*, 112 S. Ct. 841, 845 (1992) (emphasis in original), the court below clearly was correct in holding that the Respondents did not violate the Act by refusing to hire or retain these paid union agents.

¹⁰ *Id.* at 628-29.

¹¹ *Id.* at 629.

¹² The court thus distinguished the "salts" covered by its holding in this case from "typical job applicants," who, it indicated, may simultaneously be loyal both to a union and to a nonunion employer. 34 F.3d at 628-29. It also distinguished the "salts" from "those who, in addition to performing the work they were employed to do, zealously seek to persuade their fellow employees to join their union." *Id.* at 629.

Given the nature of union salting programs, it is readily apparent that the interests of a union that sends out paid salts to infiltrate an employer's work force are inherently in-conflict with the interests of the targeted employer. Indeed, the very essence of salting is to place union agents in positions they can use to place employers at a disadvantage, while claiming the protective shield of "employee" status under the National Labor Relations Act.

Because the Act contains no meaningful definition of the term "employee," it must be inferred that Congress used that term to denote "the conventional master-servant relationship as understood by common-law agency doctrine." *Nationwide Mutual Insurance Co. v. Darden*, 112 S. Ct. 1344 (1992). And, as the court below correctly recognized, such traditional employment relationships entail an element of loyalty that does not and cannot exist when the putative servants are obligated to, and paid by, another entity to use their positions with the principal to advance the conflicting interests of that other entity. *H.B. Zachry Co. v. NLRB*, 886 F.2d 70, 72 (4th Cir. 1989); *NLRB v. Elias Bros. Big Boy, Inc.*, 327 F.2d 421, 427 (6th Cir. 1964); Restatement (Second) of Agency §§ 226, 387, 394 (1957).

Extending the Act's protection to paid union salts also runs counter to the NLRA's fundamental purpose: to promote industrial peace by providing mechanisms through which employees may decide freely whether to join unions and engage in collective bargaining and other forms of concerted activity, or "to refrain from any or all such activities." 29 U.S.C. §§ 151, 157. The goals of industrial peace and worker-management cooperation are not well served

by allowing unions to twist the Act's protections for "employees" into weapons for their paid agents to use against employers. Such tactics represent the industrial equivalent of Cold War, and can only serve to thwart the Act's overriding purposes.

Nor is the cause of employee freedom of choice advanced by a policy that condones a union's use of paid agents to infiltrate an employer's labor force and carry on organizing activities while pretending to serve in the same capacity as ordinary employees. Were an employer to send its paid agents to a union hall masquerading as ordinary members, with instructions to engage in surveillance and counter-organizing activities on management's behalf until such time as the employer ordered them to stop, the NLRB certainly would not hesitate to find that the employer had unlawfully interfered with the right of real employees to decide for themselves whether to support the union or not. Union salting activities, such as those held protected by the NLRB in this and other cases, represent an exact counterpart of such employer interference, and are equally destructive of the rights of the real "employees" Congress enacted the NLRA to protect.

ARGUMENT

THE COURT OF APPEALS CORRECTLY HELD THAT PAID UNION "SALTS" WHO SEEK OR ACCEPT POSITIONS WITH AN EMPLOYER AT THEIR UNION'S DIRECTION AND UNDER ITS CONTROL, FOR THE PURPOSE OF CARRYING OUT UNION OBJECTIVES THAT CONFLICT WITH THE EMPLOYER'S INTERESTS, ARE NOT "EMPLOYEES" WITHIN THE PROTECTION OF THE NATIONAL LABOR RELATIONS ACT.

The Court must decide in this case whether the National Labor Relations Act—a statute designed to promote industrial peace through employee freedom of choice regarding union organization and collective bargaining—accords protected "employee" status to paid union "salts" who seek to infiltrate an employer's work force to carry out the union's objectives vis-a-vis the employer for as long as the union so directs, and then abandon the positions immediately when the union gives them the signal. We submit that both sound statutory construction and good public policy support the conclusion of the Fourth, Sixth, and Eighth Circuits that the Act's protection does not extend that far.

A. "Salting" by Paid Union Agents Inherently Conflicts with the Targeted Employer's Interests.

A full appreciation of the implications of the NLRB's holding that the Act's protection for "employees" extends to paid union salts requires an understanding of salting programs such as the IBEW program involved here. The nature and purposes of such programs are well documented in published literature and reported decisions.

Salting is not a new union practice, but it has become an increasingly common one in recent years.

See Northrup, 14 Journal of Labor Research at 469-475. In the construction industry, in particular, the building trades unions have seized upon salting as a strategy to offset membership losses and try to regain the market share that unionized firms have lost to "open shop" (primarily nonunion) contractors over the past two decades. In addition to the IBEW, the International Brotherhood of Boilermakers, etc. (IBB) and United Brotherhood of Carpenters and Joiners (UBCJ), among other unions, have adopted aggressive salting programs in the last few years. *Id.*

In a publication describing its own salting program, the IBEW explained that it derived the name "salting" from an analogy to "the process of 'salting' mines in order to artificially enrich them by placing valuable minerals in some of the working places." IBEW Special Projects Department, *Salting as Protected Activity Under the National Labor Relations Act* 1 (March 1993). In a case involving the IBEW program, NLRB Administrative Law Judge Raymond P. Green questioned whether the union was aware of "the irony of the salted mine analogy." *Sullivan Electric Co.*, NLRB Case No. 26-CA-16107 (February 1, 1995), JD (NY)-04-95, slip op. at 3, n. 3. As Judge Green pointed out:

The purpose of salting a mine is to defraud a prospective buyer or investor. Here, the employer is claiming that the Union's attempt to salt the job site by inserting members on the job, is similarly a fraudulent scheme to get people on the job who do not really intend to become employees.

Id.

In that same case, Judge Green listed three goals that he found to be reflected in the IBEW salting program, which he said could be either separate or overlapping:

1. To put union members on a job site so as to enable the Union to organize the Company's employees in order to gain recognition either voluntarily or through a Board election; or

2. To get union people on the job and create enough trouble by way of strikes, lawsuits, unfair labor practice charges and general tumult, so that the non-union contractor walks away from the job; or

3. If number 2 doesn't work, to create enough problems for the employer by way of unfair labor practice charges, Davis Bacon, OSHA or legal allegations requiring legal services so that even if the employer doesn't walk away from the job, he will be reluctant to bid for similar work in the local area ever again.

Id. at 5. See also *Consolidated Electrical Service, Inc.*, NLRB Case No. 3-CA-18188, JD (NY)-11-95 (February 9, 1995), slip op. at 4-5.

Administrative Law Judge Green based his conclusions as to the program's objectives in part on the IBEW's booklet, *Salting as Protected Activity*, cited above. Among the excerpts he quoted from the booklet is a statement that employers "can often be stung by [salters' use of] falsified job applications designed to conceal union employment and/or membership until after an initial cadre of salts have been hired." *Id.* at 2, quoted in *Sullivan Electric*, slip op. at 5.

In another passage Judge Green found revealing, the IBEW booklet describes an operation in which

salts were used to generate unfair labor practice charges against a targeted nonunion employer. According to the booklet, this accomplished several purposes, including:

the addition of several high-priced, non-productive journeymen (attorneys) to [the employer's] payroll;

the exposure of [the employer] to substantial backpay and interest liability plus fringe benefit accruals, if any;

the exposure of [the employer] to its own employees, its customers, and the community as an alleged labor law violator.

The booklet clearly portrayed these accomplishments as beneficial to the union's interests vis-a-vis the salted employer. *Salting as Protected Activity* at 9-10, quoted in *Sullivan Electric* slip op. at 4.

The IBEW booklet also states that "covert placement of salts or the enlistment of current employees is often only the initial step in a salting program and is only the beginning of the organizing effort in any event." *Salting as Protected Activity* at 14 (emphasis in original). It goes on to describe how salts are expected to carry on surveillance against an employer:

The employer should be watched closely for the commission of even minor ULPs [unfair labor practices] and evidence, including affidavits, should be carefully accumulated. (Remember that you have six-months in which to file charges).

Id.

The IBEW booklet leaves no question about the tactical purpose of such surveillance activities:

A time may come when the [union] will want to pull its salts and supporters out on a minority ULP strike to encourage the hiring of temporary replacements, set the stage for an unconditional offer to return, and for further actions.

Id.

Thus, the salts are used to gain information on which the union can base claims that the targeted employer has committed unfair labor practices, which the union will then claim caused or prolonged strikes by its "salts and supporters." That, in turn, will allow the union to insist that the strikers be granted reinstatement upon request. The stage is thereby set for the salts to engage in further harassing tactics from within the employer's work force.

After reviewing these features of the IBEW's salting program in *Consolidated Electrical Service*, Administrative Law Judge Green commented that it was apparent that the union and the salts "planned to engage in work stoppages at the job site and to look for reasons to justify such actions." Slip op. at 5. He continued:

With this type of predisposition, . . . the search for a reason to justify a work stoppage already planned, can lead to the strong temptation to "create" such a reason.

Id.

Another IBEW publication makes clear that setting up unfair labor practice charges as an excuse to justify work stoppages is not the only purpose for which salts are expected to engage in information-gathering. It sets forth detailed instructions to salts on making notes at all times, what to note, and how to process complaints to government agencies. IBEW Special Projects Department, *Union Organi-*

zation in the Construction Industry, Journeymen Edition, excerpted by Professor Northrup in 14 *Journal of Labor Research* at 485-87. Among other things, salts are instructed to gather information and report to the union on co-workers' names, phone numbers, and home addresses; rates of pay and company policies; employee complaints; possible violations of law by the employer; and "obvious traits of owners or managers" such as "expensive cars, life styles, [and/or] personal problems." *Id.*

The lengths to which some IBEW salts will go to carry out their espionage assignments are revealed by the facts of *Arrow Flint Electric Co., Inc.* NLRB Case No. 7-CA-35675, JD (MI)-215-94 (September 28, 1994). In that case, a professional organizer drawing a \$54,000 annual salary from the IBEW wangled a job with a small nonunion firm by fabricating references and past experience and lying to the firm's owner that he had four children to support, no job, no health insurance, and income only from his wife's waitressing job and unemployment insurance. He reported to work on the first day wearing a microphone concealed in a ballpoint pen. He used the hidden microphone to record the owner's reaction when he told her he planned to talk to her other employees about forming a union. He then used the recording of the owner's reaction (that he "wouldn't be happy" with the firm and had better move on) as a basis for an unfair labor practice charge filed with the NLRB.

The *Arrow Flint* case illustrates why some unions, particularly in the construction industry, take the view that salting is a "win-win" proposition for them. From the union's perspective, it can "win" through salting either by organizing a nonunion con-

tractor's employees or by driving the nonunion firm out of business, thereby reducing competition for unionized firms. As the administrative law judge pointed out, the salt's objective was to "get his 'foot in the door' so that he could create a situation and use the results thereof." *Id.*, slip op. at 21, n. 19).¹³ And, as the judge further noted, the costs of defending an NLRB complaint and paying backpay and interest to discharged salts can be fatal to small contractors like Arrow Flint, which had only five or six employees. *Id.*

An apt, overall characterization of salting is found in the words of NLRB Administrative Law Judge Joel Harmatz, who described the practice as "a form of entrapment reminiscent of other 'blackmail' devices." *Sunland Construction Co.*, 309 NLRB 1224 (1992) (ALJ decision at 1246). Particularly distressed about the use of NLRB procedures and protections in salting schemes, Judge Harmatz asked rhetorically whether the NLRB had not been "conscripted as an unwitting conspirator in the effort to achieve union goals . . . through pressures, rather than through . . . procedures preserving [employees'] freedom of choice." *Id.* Yet he concluded that NLRB precedents forced him to hold that an employer violated the Act by refusing employment to salts who used such tactics, and on review, all five NLRB members agreed.

Against this background, there can be little doubt that the interests sought to be advanced through

¹³ In a similar vein, the court of appeals noted in this case that a paid union salt "may even relish being discharged, because he then can file an unfair labor practice charge, claiming that he was terminated because of his organizing activities. *Town & Country Elec., Inc.*, 34 F.2d at 629.

union salting programs such as the IBEW's program are inherently in conflict with the interests of the employers targeted for salting. It is also clear on the facts of this case that, to the extent such conflicts existed, the salts were obligated to give the union's interests priority over any contrary interests of the employers.

B. The Court of Appeals Correctly Concluded that the Inherent Conflict of Interests Between the Salts and the Targeted Employer in this Case Precluded a Finding that the Salts Were "Employees" within the Meaning of the NLRA.

Like other federal statutes relating to employment, the National Labor Relations Act purports to define "employee" in circular language that never says directly what an "employee" is.¹⁴ As the court below correctly noted, in the face of such unhelpful definitions, courts must infer that Congress meant the term "employee" to refer to "the conventional

¹⁴ Section 2(3) of the Act, 29 U.S.C. § 152(3), states:

The term "employee" shall include an employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act, as amended from time to time, or by any other person who is not an employer as herein defined.

master-servant relationship as understood by common-law agency doctrine." *Nationwide Mutual Insurance Co.*, 112 S. Ct. at 1348 (interpreting the equally circular definition of "employee" in the Employee Retirement Income Security Act).

When the relationships between the paid union salts and the Respondents in this case are measured against the traditional elements of a master-servant relationship, it is readily apparent that they do not fit within that category. An essential ingredient of a master-servant relationship is at least a minimum degree of loyalty to the master. As the court below recognized, this does not rule out concurrent employment with more than one entity, but it does preclude the servant from using his or her relationship with Entity A to promote the interests of Entity B with respect to matters in which B's interests are in conflict with A's. *Town & Country Elec., Inc.*, 34 F.3d at 628, citing Restatement (Second) of Agency §§ 226, 387 and 394 (1957).¹⁵

As demonstrated in the foregoing section, however, such a conflict of interest inherently exists when a union sends paid salts to seek "employment" with a business entity that the union seeks to organize, drive out of business, or discourage from bidding

¹⁵ In a variation on the agency argument, Administrative Law Judge William F. Jacobs held that "salts" were not bona fide employees because their applications made it obvious that they were not actually seeking work. The "salts" were not listed on the union's "out-of-work" roster and made no effort to record their previous work histories on their applications, indicating that their only objective was to generate unfair labor practices or "salt" the employer. *Goodless Electric Co., Inc.*, NLRB Case No. 1-CA-31249 et al, JD (MA)-22-95 (March 2, 1995), slip op. at 22-26.

on work in competition with unionized employers. Indeed, the whole purpose of salting is to create situations in which salts' positions with employers can be exploited to promote the union's interests with respect to matters in which the union's interest are at odds with the employers'. *Accord H. B. Zachry Co. v. NLRB*, 886 F.2d 70, 72 (4th Cir. 1989); *NLRB v. Elias Bros. Big Boy, Inc.*, 327 F.2d 421, 427 (6th Cir. 1964).

Moreover, the facts of this case underscore the virtual inevitability of such conflicts, as it is clear that the salts were obliged to give their salting assignments their highest priority, until such time as the union ordered them to abandon the job. This level of control by the union left the salts with no way of according the Respondents the minimum degree of loyalty necessary to establish an employment relationship, even if they had wanted to.

C. Extending the NLRA's Protection of "Employees" to Paid Union Salts Runs Counter to the Act's Central Purposes of Promoting Industrial Peace and Employee Freedom of Choice.

The NLRB's contrary holding—in effect, that "employee" status under the NLRA entails no obligation of loyalty to the employer—can only serve to undermine the Act's basic goal of promoting industrial peace. The trust and cooperation needed to make worker-management cooperation a reality—whether through collective bargaining or through other legitimate means of employee participation in workplace decision-making—cannot readily be achieved in an atmosphere tainted by the organized deception and conspiratorial tactics that are the essence of union salting programs, as detailed above.

Moreover, as Administrative Law Judge Harmatz lamented in *Sunland Construction*, extending the Act's protection to salts encourages unions to seek to achieve their goals "through pressures, rather than through . . . procedures preserving [employees'] freedom of choice," 309 NLRB at 1246, thereby perverting another of the Act's fundamental purposes. From the earliest days of the Act, the Board has held that employers thwart employee freedom of choice when they send their agents to infiltrate unions posing as employees. See e.g., *J.P. Stevens v. NLRB*, 380 F.2d 292, 296 (2nd Cir. 1967), *cert. denied*, 393 U.S. 836 (1968) (holding that the employer's electronic surveillance of union organizers' motel rooms and recruitment of anti-union employees to attend union meetings violated § 8(a)(1)). Such interference is no less obnoxious to the Act's basic purpose when the deception is carried out by paid union agents instead of by employer agents.

CONCLUSION

For the reasons stated above, the court of appeals' holding that the paid union salts in this case were not "employees" within the protective ambit of the National Labor Relations Act should be affirmed.

Respectfully submitted,

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1994

NATIONAL LABOR RELATIONS BOARD,
v. *Petitioner,*

TOWN & COUNTRY ELECTRIC, INC.
and

AMERISTAFF PERSONNEL CONTRACTORS, LTD.,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Eighth Circuit

BRIEF OF AMICUS CURIAE
ASSOCIATED GENERAL CONTRACTORS OF AMERICA
IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Are paid union agents or "salts"* considered "employees" within the meaning and for the unique purposes of the National Labor Relations Act?

* AGC uses this term as the National Labor Relations Board has used it, to encompass full-time paid union organizers and officials, as well as those rank-and-file persons who receive a subsidy or other financial consideration for their salting efforts. Throughout this brief, AGC also uses the term "salts" to refer to all such individuals.

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1994

No. 94-947

NATIONAL LABOR RELATIONS BOARD,
v. *Petitioner,*

TOWN & COUNTRY ELECTRIC, INC.

and

AMERISTAFF PERSONNEL CONTRACTORS, LTD.,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Eighth Circuit

BRIEF OF AMICUS CURIAE
ASSOCIATED GENERAL CONTRACTORS OF AMERICA
IN SUPPORT OF RESPONDENTS

INTEREST OF THE AMICUS CURIAE ¹

The Associated General Contractors of America ("AGC") is a non-profit trade association, representing approximately 33,000 general contractors and other firms in the construction industry. Many of its members have collective bargaining relationships with labor unions, and many others do not. Its members range from small family owned businesses to the largest contractors in the country. Collectively, they perform the majority of the construction

¹ Letters of consent have been filed with the Clerk in accordance with Rule 37.3.

of public and commercial buildings, highways, industrial and defense facilities, and municipal utilities in America.

Over the last five years, many of AGC's open-shop members have been confronted by paid union organizers, or "salts," and the labor problems stemming directly from their application for open-shop employment. Some of its members have also been targeted by a nationwide campaign, known as "Construction Organizing Membership Education Training" (commonly known as "COMET"). That campaign has generated a substantial amount of litigation before the National Labor Relations Board ("NLRB") and in various Courts of Appeals. Most of the unfair labor practice charges filed by unions under COMET involve either the refusal to hire or the discharge of salts, in alleged violation of the National Labor Relations Act ("Act"). It follows that the question presented by this case is of paramount importance to AGC.

In representing the interests of its members, AGC has appeared as an *amicus curiae* in selected cases of substantial interest to the construction industry, including the Fourth Circuit's decision in *H.B. Zachry Co.*, 289 NLRB 838 (1988), *enf. den'd.* 886 F.2d 70 (4th Cir. 1989); and the NLRB's consolidated hearing in this case and its companion case, *Sunland Construction Company, Inc.*, 309 NLRB 1244 (1992).

AGC has also participated in numerous cases in this Supreme Court, including, *Connell Construction Co. v. Plumbers & Steamfitters Local 100*, 421 U.S. 616 (1975); *Erward J. DeBartolo Corporation v. NLRB*, 463 U.S. 147 (1983); *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547 (1990); *Building & Construction Trades Council v. Associated Builders and Contractors*, 113 S.Ct. 1190 (1993); and most recently, in *Adarand Constructors v. Pena*, No. 93-1841, cert. granted September 26, 1994.

AGC is submitting this *amicus curiae* brief in support of Respondents, urging the Court to affirm the Eighth Circuit Court of Appeals in the decision below, reported at 34 F.3d 625 (8th Cir. 1994).

STATUTORY PROVISIONS

Section 2(2) of the National Labor Relations Act ("Act"), 29 U.S.C. § 152(2) provides in relevant part:

"When used in this Act—

- (2) The term 'employer' includes any person acting as an agent of an employer, directly or indirectly, but shall not include . . . any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization."

Section 2(3) of the Act, 29 U.S.C. § 152(3) provides:

"When used in this Act—

- (3) The term 'employee' shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act, as amended from time to time, or by any other person who is not an employer as herein defined."

SUMMARY OF ARGUMENT

Section 2(3) of the Act should not be construed to give union salts the rights and status that Congress reserved for bona fide "employees." Doing so would give the salts' true employers—the labor unions—a range of special privileges that the Act never intended unions to enjoy. It would also dramatically tip the balance between the competing interests of labor and management decidedly in favor of labor.

This Court's interpretation of Section 2(3) should reflect not only its wording, but also the common law of agency, and of course, the purpose of the Act. On at least three occasions, this Court has found it necessary to go beyond the literal statutory language of Section 2(3). In one case, the Court held that applicants for employment are "employees," although the statutory wording would not dictate that result. In the other two decisions, this Court excluded managerial and retired persons from the "employee" definition, although once again the literal wording would have dictated otherwise. In sum, this Court has recognized that the wording of Section 2(3) is an imperfect guide to its meaning, and that a completely literal approach would have consequences contrary to the Act's purposes.

In interpreting Section 2(3), the Court should look beyond the statutory language defining "employee" to "include any employee" to the common law of master-servant and agency, as discussed in Respondent Town & Country's Brief. However, should the Court decide to limit its interpretation of the Act without resort to the common law, industrial realities, or any other sources, full-time, paid union organizers are excluded from the Act's coverage because they are employed by a union, which is not an employer under the Act. Therefore, they fall within the last exception of Section 2(3).

Section 7 of the Act confers several rights on employees, including the right to *self*-organization, to engage in collective bargaining, and the right to refrain from any

or all of those activities. The Act seeks to create a delicate balance between the adversarial, conflicting interests of labor and management, to ensure that bona fide employees are not unfairly dominated by either. Unions have no Section 7 rights; yet, by engaging in the type of activity seen in this case, the unions are attempting to boot strap themselves into Section 7 protections, thereby destroying the Act's balance of power. The union salts in issue are clearly agents of the union, being instructed, directed, paid and subsidized for their organizing activity. Allowing the union salts to enjoy Section 2(3) status would further the union's institutional goals to the detriment of a contractor's bona fide employees and their Section 7 protections. Stripped to its essence, the International Brotherhood of Electrical Workers ("IBEW") wants Section 7 rights to further its institutional interests.

This case should not be considered in a vacuum. In the last two years, the construction industry has seen a very aggressive nationwide union organizing campaign, modeled in large part on the IBEW's salting program, called the Construction Organizing Membership Education Training Program ("COMET"). COMET utilizes thousands of union salts to exert economic pressure on open-shop contractors to accede to the union's demands. The COMET program has exacted enormous litigation costs from contractors, costs that must be absorbed even if those contractors' actions are ultimately found to be lawful. One of the cornerstones of the COMET campaign has been the NLRB's holding that the union salts are entitled to Section 2(3) protection.

Although organizing may be a goal, exacting enormous litigation costs from non-union contractors is also a primary objective of COMET. This strategy is designed to force the non-union contractor out of business or to accede to the union's demands.

Also, to confer employee status on union salts would allow the unions to "pack the unit" and skew any election results. It is uncontroverted that the union salts in the

case sub judice have been paid by the union for their allegiance and support. This is a case of money changing hands to influence votes, buy support, and obtain influence. The National Labor Relations Act was not intended to authorize or protect such practices.

Finally, if paid, full-time union agents are to be considered employees, an employer should still be free to reject them during an intense salting or COMET campaign due to the inherent conflicts of interest that would destroy the balance between unions and employers which the Act was designed to maintain.

ARGUMENT

I. THE LANGUAGE OF SECTION 2(3) IS AN IMPERFECT GUIDE TO ITS MEANING.

The Petitioner National Labor Relations Board ("NLRB"), the International Brotherhood of Electrical Workers, Local 292 ("IBEW"), and the amicus curiae supporting their position, belabor the obvious point that Section 2(3) is broadly worded. On that basis, they urge this Court to give the union salts the rights and status that Congress intended to reserve for employees. However, this Court has on at least three occasions found the wording of Section 2(3) to be an unreliable guide to its meaning.

In *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 61 S.Ct. 845 (1941), this Court held that the predecessor provision to Section 2(3) should be understood to include applicants for employment. Nowhere in the statutory language is the word "applicant" found; however, the Court had little difficulty in interpreting the provision to include "applicants." In *NLRB v. Bell Aerospace*, 416 U.S. 267, 94 S.Ct. 1757 (1974), the Court again found it necessary to go beyond the vocabulary of Section 2(3), holding that managerial employees were excluded from that section, even though such individuals could clearly fit within the literal definition. Similarly, in *Chemical Workers v. Pittsburgh Glass*, 404 U.S. 157, 166, 92 S.Ct. 383, 390 (1971), the Court held that

retired workers were not included within the meaning of "employee."

Chemical Workers warned that the NLRB's interpretations of the statute were not exempt from judicial review, and noted that its definitional sections, and Section 2(3) in particular, outline the types of employment covered, but do not provide an exhaustive list or a conclusive interpretation of the term "employee." 404 U.S. at 166-168, 92 S.Ct. at 390-392.

In *Chemical Workers*, the Court also reviewed the legislative history of Section 2(3), noting that the House of Representatives in 1947 intended "employee" to mean a person who would work for wages or a salary under direct supervision. (H.R. Rep. No. 245, 8th Cong. 1st Session, 18, 1947.) See *Chemical Workers v. Pittsburgh Glass*, 404 U.S. at 167-168, 92 S.Ct. at 391-392. The Court added, however, that "[i]n doubtful cases resort must still be had to economic and policy considerations to infuse Section 2(3) with meaning." 404 U.S. at 168, 92 S.Ct. at 392. The Court based its interpretation of Section 2(3), in part, upon its prior holding in *NLRB v. Hearst Publications, Inc.*, 322 U.S. 111, 64 S.Ct. 851 (1944), where the Court had agreed with the Board's conclusion that newsboys were within the original definition of "employee," even though they may have worked for an independent contractor. Congress subsequently criticized the Court's decision in *Hearst Publications* and amended Section 2(3) in 1947 to exclude independent contractors. The fact remains, as the Court stated in *Hearst Publications*, that Section 2(3) "must be read in the light of the mischief to be corrected and the end to be attained." *Hearst Publications*, 322 U.S. at 124, 64 S.Ct. at 857.³ The *Hearst Publications* comment regard-

³ In *NLRB v. United Insurance Company of America*, 390 U.S. 254, 88 S.Ct. 988 (1968), the Court noted that the Congressional change to Section 2(3) was "to have the Board and the Courts apply general agency principles in distinguishing between employees and independent contractors under the Act." 390 U.S. at 256, 88 S.Ct. at 989-990.

ing a realistic approach to the interpretation of Section 2(3) is almost identical to the statement in *Chemical Workers* and makes perfect sense because, as this Court has held, the statute does not helpfully define the term.⁴

In related contexts, this Court has resorted to the common law to define the term "employee" if a statute provides little guidance. See, for example, *Nationwide Mutual Ins. Co. v. Darden*, 503 U.S. 518, 112 S.Ct. 1344 (1992) [interpreting the term "employee" in ERISA]. The same exercise should apply herein when trying to fathom the Congressional intent of Section 2(3) that: "The term 'employee' includes any employee . . ."

It would also be a mistake to analyze the common law of master-servant and agency without considering the Act's purposes. The Petitioner NLRB, the IBEW, and the amicus curiae discuss at great length certain common law principles of master-servant relationships, and the proposition that a person can simultaneously serve two masters if it would not require an abandonment of one to the advantage of the other.⁵ The analysis of whether the union salts should receive the Act's protections should not be based entirely upon the statute's literal wording or common law principles. Rather, unless one actually analyzes the problem in the context of the Act's underlying purposes, an inequitable result will occur. In analyzing Petitioner's attempts to clothe the paid union salts with employee status, amicus AGC respectfully reminds the Court of one of its past admonitions:

It is a "familiar rule, that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the

⁴ In *Nationwide Mutual Insurance Company v. Darden*, 503 U.S. 518, 112 S.Ct. 1344 (1992), the Court held that the National Labor Relations Act does not provide much, if any, guidance in the interpretation of "employee." See 112 S.Ct. at 1349, n.4.

⁵ Of course, salts are always subject to the direction of their real employer—the union—to immediately abandon service to the open-shop contractors they are trying to organize.

intention of its makers." *Holy Trinity Church v. United States*, 143 U.S. 457, 459. *National Woodwork Manufacturers Assn. v. NLRB*, 386 U.S. 612, 619 (1967). [*Connell Construction Co. v. Plumbers Local 100*, 421 U.S. 616, 628 (1975)]

When Congress passed the National Labor Relations Act, it did so with the purpose of minimizing industrial strife. In order to accomplish this basic purpose, Congress did not grant to either labor or management specific rights in Section 8, but rather regulated both parties' conduct towards those individuals entitled to protection under Section 7.

Thus, resort to the "plain meaning" rule of construction would be inappropriate given this provision's lack of statutory guidance and history. Although amicus AGC is mindful that the Court in *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 104 S.Ct. 2803 (1984) referred to the extreme breadth of Section 2(3), concluding that illegal aliens were in the protected class, this Court also can and should interpret the statutory language to avoid upsetting the very policies that underlie the Act. Including union salts within the statutory definition of "employee" would devastate the balance that Congress intended.

However, if this Court were to take a literal approach, it would have to conclude that paid union organizers are not employees because the final clause of Section 2(3) expressly excludes them. These organizers are employed by the IBEW, which is not an employer under the Act because Section 2(2) excludes a "labor organization (other than when acting as an employer)" from the definition of "employer." Being paid employees of a labor organization, which is not an employer, they are literally excluded by Section 2(3)'s exclusionary language because they are employed by a "person who is not an employer."

II. THE COURT'S INTERPRETATION OF SECTION 2(3) SHOULD PRESERVE THE DISTINCTION BETWEEN EMPLOYEES' PERSONAL INTERESTS AND UNIONS' INSTITUTIONAL INTERESTS.

In *Carpenters Union v. NLRB*, 357 U.S. 93, 99-100, 78 S.Ct. 1011, 1016 (1958), this Court recognized the balance in the NLRA "between the uncontrolled power of management and labor to further their respective interests." Section 8(a) of the Act regulates employer action, while Section 8(b) defines illegal acts of unions. By striking this balance, the Act sets forth the terms and conditions upon which unions and employers can compete for employees' preferences for or against union representation. This principle was most recently enunciated in *Lechmere, Inc. v. NLRB*, 502 U.S. 527, 112 S.Ct. 841 (1992), where the Court held that an employer was within its rights to bar non-employee organizers from its property. The Court determined that Section 7 of the Act granted rights to employees, not to unions or their non-employee organizers. 112 S.Ct. at 845.

Lechmere was grounded upon the prior decisions in *Central Hardware Co. v. NLRB*, 407 U.S. 539, 92 S.Ct. 2238 (1972) and *Hudgens v. NLRB*, 424 U.S. 507, 96 S.Ct. 1029 (1976), which rested, in turn, upon the Court's seminal decision in *NLRB v. Babcock and Wilcox Co.*, 351 U.S. 105, 76 S.Ct. 679 (1956). Restricting non-employee organizing activities on an employer's property, the Court in *Babcock and Wilcox* warned that an employee's Section 7 rights and an employer's property rights "must be obtained with as little destruction of the one as is consistent with the maintenance of the other." 351 U.S. at 112, 76 S.Ct. at 684.

By conferring employee status on union salts, the NLRB destroys this delicate accommodation. In effect, a union can do indirectly what it cannot do directly. Under the NLRB's interpretation of Section 2(3), a union can infiltrate the employer's property by the use of paid representatives to do its organizing, when it would be

unable to engage in the same type of activity itself under *Lechmere* and its predecessors. According to *Lechmere*, a union organizer seeking access to a contractor's site can be turned away. However, according to the NLRB in this case, the union agent can then step into the nearest phone booth, shed his organizer suit, quickly change into his applicant (employee) clothes, and re-appear for a job. Under the NLRB's interpretation, he must now be accorded all rights of an employee and hired if otherwise qualified. This position exalts form over substance because the only variable between the union salt in this case and the union organizer in *Lechmere* is the different announcement that the person makes to management. In the former situation, the union salt simply states that he is seeking employment, as opposed to the union organizer in *Lechmere* stating that he wanted to enter the premises to organize the employees. This is a distinction without a difference.

As all parties concede, the persons for whom the Petitioner seeks protection are all *paid* to advance the union's institutional interests. It is, in this context, appropriate to ask a common sense question: Exactly who is seeking employment? There can be little doubt that under common law agency principles, the union salts in issue are agents of the IBEW. There is no question regarding the union's payments to the particular salts, nor is there any question that the salts sought employment that would be governed by the union's salting resolution.⁶ In effect, the contractor was being asked to hire the union—the principal that would actually initiate the application process and establish the duration and other conditions of the salts' employment. It is the union that establishes the objective for seeking that employment. It is the union, not the individual union salt, or the contractor, who has absolute control over the individual. Yet, the union, as an institution, has absolutely no rights under Section 7

⁶ The salting resolution is discussed below by the Eighth Circuit at 34 F.3d at 629, and is found in the Joint Appendix at page 256.

or any other provision of the Act. As this Court held in *Lechmere, Inc. v. NLRB*, 112 S.Ct. 841, 845 (1992):

Section 7 of the NLRA provides in relevant part that "[e]mployees shall have the right to self-organization, to form, join, or assist labor organizations." 29 U.S.C. § 157. Section 8(a)(1) of the Act, in turn, makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of rights guaranteed in [Section 7]." 29 U.S.C. § 158(a)(1). By its plain terms, thus, the NLRA confers only on *employees*, not on unions or their non-employee organizers. (emphasis supplied).

By using the union salts in the manner sought herein, it is obvious that the IBEW was seeking an undue advantage, outside the scope of the Act's intention, and in direct derogation of this Court's *Lechmere* principle.

III. THE COMET CAMPAIGN REVEALS THE UNIONS' REAL PURPOSE AND OBJECTIVE.

The brief of amicus curiae International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmith, Forgers and Helpers, AFL-CIO ("I.B.B."), in support of the Petitioner, describes a union organizational campaign known as "Fight Back" on pages 1-4. The I.B.B. Fight Back campaign and the IBEW's salting resolution were the precursors to a nationwide union strategy announced at the AFL-CIO Building and Construction Trades Department's annual legislative conference on April 19-22, 1993. The national campaign, called the Construction Organizing Membership Education Training program ("COMET"), "is a form of stepped-up salting that uses rank-and-file members trained for this type of organizing."⁷ It was reported in October, 1994 that nearly 40,000 members of the IBEW had completed a union training program under COMET, with the intention of

⁷ Bureau of National Affairs, *Construction Labor Report*, Volume 39, No. 1928 (April 29, 1993), p. 231.

seeking employment on non-union construction sites and filing unfair labor practice charges with the NLRB if they were not hired.⁸ The NLRB has been inundated with unfair labor practice charges filed by IBEW salts, as well as those from other unions.⁹ These charges include refusal to hire and discharges when the union salt is terminated for any reason. A self-avowed goal of the COMET campaign is to cripple non-union construction companies by causing disruption in operations and forcing the expenditure of legal fees in order to combat the unfair labor practice charges.¹⁰ The ultimate stated goal of the campaign is clear: either hire the salts or face expensive litigation. The unstated but clear objective is to force the non-union contractor out of business or capitulate to union demands without an election by the employees. As noted in ENR Engineering News-Record:

Most nonunion contractors tend to be smaller firms and the building trades plan to wear down their resources by filing unfair-labor-practice charges with the National Labor Relations Board every time the companies make a mis-step under the National Labor Relations Act. The first charges out of the chute likely will be for contractor discrimination in not hiring union members and organizers just because of their union affiliation. 'Get right in their face' with union jackets and other insignias, ad-

⁸ Bureau of National Affairs, *Daily Labor Report*, No. 207 (October 28, 1994), p. A-3.

⁹ In its Petition for Certiorari at page 29, the NLRB advised there were 70 pending cases involving paid union organizers as of the time the Petition was filed. It is believed that number has increased. See also, "Union 'Salts' Infiltrate Construction Industry," by Robert Tomsho, Wall Street Journal, November 18, 1993, p. B1.

¹⁰ The COMET program is discussed at length by Professor Herbert R. Northrup in his article "Salting the Contractors' Labor Force: Construction Unions Organizing with NLRB Assistance," *Journal of Labor Research*, Vol. XIV, No. 4, Fall 1993, pp. 469-492.

vocated Rudicell [Director of organizing for the IBEW].¹¹

The COMET campaign is grounded upon and advanced by the salting efforts of those individuals either employed full-time by the various unions or subsidized in some financial manner for their efforts, such as the individuals in the case sub judice. In his decision in *Sunland Construction Company, Inc.*, 309 NLRB 1224, 1246 (1992),¹² Administrative Law Judge Joel Harmatz succinctly summarized the danger of the I.B.B. Fight Back campaign (and by analogy COMET):

It is not far fetched to regard the "strike back" strategy as built upon a form of entrapment reminiscent of other "blackmail" devices which in 1958 led to enactment of Section 8(b)(7) strictures on recognition picketing. It is true that neither picketing, nor secondary activity was directly involved here. Instead, the employee protections of Section 8(a)(3) were central ingredients of a scheme whereby an unorganized employer would be pressured to capitulate, go out of business, or face recurring union sponsorship of mass applications in the midst of future projects. From my perspective, a serious question arises as to whether, through the complaint in this proceeding, the Board has been conscripted as an unwitting conspirator in the effort to achieve union goals . . . through pressures, rather than through the statutory procedures designed to assure that compulsory bargaining begins with procedures preserving freedom of choice.

However, Judge Harmatz was constrained by prior Board precedent to accord the union salts the protections of Sections 7 and 8 of the Act by conferring upon them the "employee" status of Section 2(3).

¹¹ ENR Engineering News Record, "Building trades plan big organizing drive," May 3, 1993, p. 6.

¹² *Sunland Construction Company, Inc.* was a companion case to *Town & Country Electric, Inc.* at oral argument before the National Labor Relations Board on March 18, 1992.

The issue of employee status under Section 2(3) is as central to the COMET campaign as it is to this case.¹³ One cannot completely disregard the realities of labor-management relations and the goals of a salting effort. The following comment from the Fourth Circuit Court of Appeals in *H.B. Zachry Co. v. NLRB*, 886 F.2d 70, 74 (4th Cir. 1989) is undoubtedly true:

The Board's contention that a paid union organizer is a bona fide applicant protected under the NLRA is even more plainly wrong when examined in light of the policy concerns underlying the Act. *The Act pre-supposes some degree of adversariness between employers and unions. In order to protect the right of employees to determine for themselves, free from undue interference from either employer or union, whether or not to unionize, the Act places limits on the context in which this adversariness operates.* (emphasis added)

Understood in this context, this Court should be wary that the unions are seeking to achieve objectives found to be clearly unlawful in *Lechmere*, usurping property rights and gaining access to an employer's property by means not authorized by the Act.

The Petitioner NLRB, the IBEW, and their amicus curiae make much of the salts' ultimate objective. They repeatedly assert that the salt's objective is to organize non-union employers and their employees. Surely, such an objective is at the very core of the Act's purpose. However, at least within the construction industry, there is considerable doubt as to whether organizing is the primary goal, or whether expensive litigation and possibly the imposition of backpay awards by the Board are the true objectives. The COMET campaign has not resulted in many petitions for elections, but rather numerous

¹³ It may be no coincidence that the COMET campaign was announced in April, 1993. The NLRB issued its *Sunland* and *Town & Country* decisions on December 16, 1992, giving tremendous support to the trade unions to increase their salting efforts.

unfair labor practice charges against contractors. The campaign is not about free choice for construction employees, but rather the subverting of NLRB processes to bully contractors—sign up or face charges.

Judge Harmatz, in his decision in *Sunland Construction Company*, was mindful of this problem in the construction industry, when he stated:

I hold no illusions that there was genuine interest in securing organization of an employee majority on this project as contemplated by Section 9 of the Act. Thus, it is fair to infer that the Union was well acquainted with boiler outage work, and . . . must have known that the St. Francisville project was only about 2 months short of scheduled completion when the initial group of applications [by IBB salters] were submitted (t)he implication should have been clear to all; i.e., the organization of this short term project was too impractical to be a realistic goal

[I]n formulating this plan, the Union would have been mindful that outage jobs are awarded pursuant to competitive bidding, that cost-wise, they are labor intense, that the price is fixed, and that completion delays are unacceptable. For these reasons alone, it was foreseeable to a reasoned certainty that this 'merit shop [open-shop] employer' in such circumstances would avoid hiring those commended by the organizers There is little doubt in my mind . . . that backpay, rather than bona fide organization, was the cornerstone of its strategy. [309 NLRB at 1245-1246.]

As did Administrative Law Judge Harmatz, this Court has every reason to be suspicious when the Petitioner NLRB, the IBEW, and their amicus curiae argue that salting efforts only serve to uphold the Act's purposes of collective bargaining.¹⁴

¹⁴ As noted in Robert Tomsho's Wall Street Journal article, footnote 9, *supra*, "Wayne Devine loves to be fired. A pink slip is a badge of honor for the 33-year-old Jackson, Miss., electrician, who

If organizing is a highly debatable goal, then what purpose would it serve for the salts to actually work for a non-union employer? The answer reflects the basic conflict between an open-shop employer's interests and the unions' institutional interests. As the Eighth Circuit explained:

When a union official applies for a position only to further the union's interests, we believe that an inherent conflict of interest exists. In this situation, the union official will follow the mandates of the union, not his new employer. If the union commands him to increase his organizational activities at his second employer's expense, he will do so. If the union asks him to quit working for his second employer, he will do so. Additionally, a union organizer in this position has a reduced incentive to be a good employee for his second employer. If he is terminated, he simply returns to his full-time union job. Indeed, he may even relish being discharged, because he then can file an unfair labor practice charge, claiming that he was terminated because of his organizing efforts. [*Town & Country Electric, Inc. v. NLRB*, 34 F.3d 625, 628-629 (8th Cir. 1994).]

Simply stated, the union salt has no real incentive to further the interests of the contractor; rather, his interest is to serve his union at all times. The short project duration gives greater weight to the argument that the salts' true objective is litigation, backpay, and disruption of the open-shop contractors' job progress by walkouts, slowdowns, and other means of interruption.

IV. THE PAID UNION ORGANIZER LACKS THE INDEPENDENCE OF A BONA FIDE EMPLOYEE.

As the Fourth Circuit made clear in *H.B. Zachry* and this Court reiterated in *Lechmere*, it is foolhardy to presume an absence of adversariness or animosity between

is part of a bold, new organizing campaign by the nation's construction unions."

open-shop employers and unions.¹⁵ Any examination of whether union salts deserve employee status under Section 2(3) must be viewed in that context. The Petitioner NLRB, the IBEW, and their amicus curiae argue that union salts are subject to the same work rules as any other employees, and are subject to discharge for any reason or no reason (except union activity). They maintain that the union salt is largely indistinguishable from the union zealot who actively campaigns for the union during his free time.¹⁶ This argument assumes that a person can simultaneously serve two masters who have vastly competing interests. This position misses the mark, and is factually inaccurate.

First, there is no dispute that the union salts want the jobs in issue not for the job's sake, and the income that it can generate or the career opportunities it can provide, but rather for the ulterior motive of disrupting the non-union contractor. The union salt does not want the job—the union wants it for its own institutional purposes and assigns the salt the task of acquiring it and achieving those objectives. Although the Petitioner NLRB, the IBEW, and their amicus curiae argue that the employer has the right to voluntarily establish an employment relationship with any individual it desires (as long as there is no discrimination on the basis of some prohibited reason, such as union activity), who is the employer really being asked to hire? No employer should be forced to establish an employment relationship with an individual who is under third party control. Yet, that is the situation presented by union salts. Is there any analytical

¹⁵ In fact, there is no difference in the relationship between the employer and the union that concerned the Court in *Lechmere*, and the relationship between the employer and the union salt in this case. As demonstrated above, the union salt is representing the union's institutional interests, and the *Lechmere* reasoning applies with equal force.

¹⁶ This argument was raised by the District of Columbia Circuit of Appeals in *Willmar Electric Service, Inc. v. NLRB*, 968 F.2d 1327, 1329-1330 (D.C. Cir. 1992), cert. den'd 118 S.Ct. 1252 (1993).

difference between the union salt in this case and the situation in which a competitor plants its own employee with another company to serve its own particular interests? In the latter situation, it is inconceivable that any court would require the employment of the plant. Why, then, should the union salt receive such protection? Rather, the employer should have the right to voluntarily establish an employment relationship with anyone it desires (as long as there is no prohibited discrimination) without worrying that a third party competitor is actually regulating the relationship.

The issue of "control" is central to understanding the competing interests involved. The ultimate control of the union salts' employment duration and even obtaining employment at the non-union contractor lies not within the province of either the construction employer or the salt himself, but rather the union. The union salt owes his job, and the duration of his job, to the union, not to himself or the employer. This is simply not a natural employer-employee relationship as that term is commonly understood. The situation presented here is much different than the hypothetical situation posed by the D.C. Circuit in *Willmar Electric Service, Inc. v. NLRB*, 968 F.2d 1327 (D.C. Cir. 1992), cert. den'd 113 S.Ct. 1252 (1993), when it could not conceive of a difference between the union salting situation and the union zealot who was not paid or subsidized by the union. Actually, the difference is glaring: in the former situation, the union is in absolute and ultimate control over the initiation, duration and termination of the employment relationship. In the latter situation, the union zealot is under no such control. He can work for as long as he desires, and cease his advocacy for the union without penalty, which the union salt plainly cannot do.

The practical distinction to the contractor is compelling. As noted by the Eighth Circuit below, the salting resolution in issue specifically provides that "such members, when employed by non-signatory employers, shall

promptly and diligently carry out their organizing assignments, and leave the employer or job immediately upon notification." (*Town & Country Electric, Inc. v. NLRB*, 34 F.3d at 629, emphasis added). There can be no question that as opposed to the union zealot, the salt can only work for the contractor for as long as he is allowed by his union. He has no practical choice but to leave the job under orders from his union employer. One can imagine the type of control and power that the union could thus exert in a typical job site situation when time for performance is normally of the essence.

Take, for example, a concrete pour that is scheduled for a particular time in a day. There would be nothing to prevent the union from ordering its salts to leave the job immediately before the concrete pour, thus rendering such work impossible and causing undeniable economic harm to the contractor. Assume, for example, emergency wiring that the IBEW salts might have to perform as part of their job duties. There would be nothing to prevent the IBEW from removing its salts at the very time that difficult, emergency wiring was scheduled to be done, thus endangering the job and possibly the safety of other workers. It is not enough for the IBEW, or any other construction union, to say that it would never do such a thing. The fact remains that under the salting resolution, it would have the full power to do so, and such a directive is certainly consistent with its objective of maximizing its economic and institutional strength against the non-union contractor whenever and wherever it chooses, for maximum leverage and benefit. The right to control a salt's job site activities and the duration of those activities lies at the very heart of the distinction between the union zealot and the union salt in the case sub judice and is the reason salting programs like COMET exist. The non-union contractor should have every right under the Act to enter into employment relationships with those individuals who choose to work for it of their own free will and accord, without outside, third-party control by

an admitted adversary employer with a clear conflict of interest. This is entirely consistent with both the Act and the common law on employer-employee relationships.

The IBEW (Brief, p. 44) and amicus IBB (Brief, p. 11) argue that the persons working for Town & Country, including the union salts, were at-will individuals, who could be terminated at any time for any non-proscribed reason, or they could have quit at any time for any reason; therefore, the issue of outside control should be of no moment to the contractor. The argument is unavailing for two reasons. First, it is fair and reasonable for an employer to expect a new hire to continue working for the foreseeable future, and for the employer to believe that any decision to leave will be *that person's decision, alone*. If there is any limitation upon the actual control of duration, it should be between the employer and the individual, not a third party such as a union. Even in the absence of an inquiry by the employer in the application process as to whether the employee truly desires to work for the foreseeable future, the employer would have every right to dismiss the employee subsequent to the hiring decision if the employer should find out that there is some limitation upon the employee's control over the length of employment. Yet, in the context of Section 8(a)(3) of the Act, if the employer should happen to discover that the union salt's job duration is actually controlled by the union, it would be illegal to discharge the individual on that basis alone if the salt were granted Section 2(3) protection. This would be grossly unfair and illogical. At-will employment means that the employer and employee control the duration of employment, not an outside agency, i.e. the union.

Second, the unions' interpretation of at-will employment status actually grants the salts an unfair measure of protection from discharge. In a true at-will situation, the employer can discharge the employee for any reason, or no reason. Clearly, federal and state statutes place restrictions upon any employer's right to discharge its

employees. The unions are well aware that Section 8(a)(3) of the Act prohibits a discharge on the basis of union activity or affiliation alone. In the context of unfair labor practice proceedings before the NLRB, although it is true that the general counsel must first prove that union activity was a motivating reason for any discharge,¹⁷ in practice this burden is rather easily met. If an employer discharged a union salt for any reason or no reason (which would be its right under traditional at-will analysis), unfair labor practice charges would follow, and the employer would have to justify its decision based upon a permissible reason. This converts the at-will relationship to one that in effect requires just cause for termination. The employer could not terminate the union salt for any or no reason, as it could terminate other employees, without facing expensive litigation. There simply is no true at-will relationship between the employer and the union salt as that term is commonly understood.

Even if the employer terminates the union salt for poor performance, litigation surely follows. As the Eighth Circuit noted in *Town & Country*, one of the motives of the COMET campaign is to engage the employer in expensive litigation regardless of its merit and ultimately hope to win backpay awards. Proving poor performance before the National Labor Relations Board is certainly not as easy as the unions argue. However, even if the employer should prevail, it will have spent money and time on its legal defense.

The Petitioner NLRB, the IBEW, and their amicus curiae argue that an employer can legally avoid the possibility that the union may control the employment relationship by adopting a valid rule prohibiting temporary or concurrent employment. However, such a rule would

¹⁷ *Wright Line*, 251 NLRB 1083 (1980), enf'd 662 F.2d 899 (1st Cir. 1981), cert. den'd 455 U.S. 989, 102 S.Ct. 1612 (1982). The *Wright Line* burdens of proof were approved by the Supreme Court in *NLRB v. Transportation Management Corporation*, 462 U.S. 393, 103 S.Ct. 2469 (1983).

pose obvious problems for the contractor. First, fixing the duration of employment could convert the employment relationship into something other than at-will. In other words, the NLRB would in effect require the open-shop contractors to give up their right to employ individuals at-will. Furthermore, union salts might very well respond to such policies in a manner that does not disqualify them. For example, they may simply tell the employer that they are not seeking temporary or concurrent employment. Also, the unsuspecting non-union contractor could commit unfair labor practices in attempting to administer the very rules that the Petitioner NLRB and IBEW propose in their Briefs. Certainly, the contractor's inquiry would probably lead to unfair labor practice charges based upon unlawful interrogation. Even if the contractor had a facially neutral rule that prohibited simultaneous employment or third party control over the duration, there is nothing to prevent a union from filing unfair labor practice charges on behalf of the union salt if the person was not hired. If the charges provided meritless, the contractor would still incur legal expenses.

V. PAID UNION ORGANIZERS SKEW THE REPRESENTATION PROCESS.

Even if it were assumed that salts have a truly organizational objective, the Petitioner's arguments cannot withstand scrutiny. Affording the unions and their salts the status of "employees" ignores the law's primary purposes and frustrates Section 7's intent.

Section 8(a)(1) and (3) prohibits discrimination in hiring on account of union activities or the lack thereof. Since the employer may not use union or non-union status as a basis for hiring any person, neither the employer nor the union has any decided advantage in the Board's representational process under Section 9 of the Act. Rather, it will be the employees themselves, and their own particular individual preference, that will ultimately determine whether there will be union representation. Once employed, and having experienced the employer's

wages and employment practices, individuals can freely choose their fate. It should not be forgotten that Sections 1 and 7 of the Act are designed to grant employees the right to self-organization, to collectively bargain, and also to refrain from any of the listed activities.

Undoubtedly, an individual could have the same motive as a union, to work at the project only if it were organized. This would certainly be his or her right under Section 7 of the Act. It is an entirely different matter, however, for a union to pay individuals to flood a construction project with salts solely to advance the union's institutional interests. The union could skew the results of a representation election, at the expense of the bona fide employees' Section 7 rights.

Amicus ACLU argues for treating paid union agents or salts as employees because it promotes and facilitates self-organization (Brief of ACLU, pp. 12-13). To the contrary, union salts pack the unit with agents of another employer (the union) and can destroy the rights of the majority of true employees, who work only for the employer, to determine their employment future by selecting or rejecting a union. The employees' right to choose—or reject—a collective bargaining agent can be diluted by the voting power of the salts or union agents.

Petitioner NLRB has made it clear that it is unlawful for any employer to hire persons with the intention of obtaining a sufficient number of anti-union employees to out-vote those persons who favor a union. This organizational tactic is called "packing the unit" and has consistently been held to be illegal employer conduct. See, for example, *Airborne Freight Corp.*, 263 NLRB No. 181 (1982), enforcement den'd on other grounds 728 F.2d 357 (6th Cir. 1984); *Suburban Ford, Inc.*, 248 NLRB No. 51 (1980), enforced in part 646 F.2d 1244 (8th Cir. 1981); *C. Markus Hardware, Inc.*, 243 NLRB No. 158 (1979). This prohibition should be equally applicable to a union and its agents because under either scenario, bona fide employees are denied the self-organizational

difference between an employer's unit packing and what the union sought to achieve in the case at bar. In fact, the Fourth Circuit in *H.B. Zachry Co. v. NLRB*, 886 F.2d 70, 74-75 (4th Cir. 1989) was very mindful that salts could skew the results of any representation election, "saddling the bona fide employees with a union which a majority did not favor. If the practice here is accorded judicial approval, a union might command significant numbers of its employees to work for corporations in which elections are anticipated in order to skew the results." 886 F.2d at 74-75. The union's objectives in this case are even more nefarious because the union salts are in fact paid and subsidized for their efforts. This is truly a case of money changing hands in order to buy votes, support, and influence in the representation context.

In order to avoid this argument, the NLRB contends that it has rules to determine eligibility to vote in a representation election, and that the union salts could possibly be excluded from any election.¹⁸ Petitioner NLRB argues that bargaining unit issues are different and totally distinct from employee status under Section 2(3). Although this argument may be academically correct, one can easily foresee and predict the litigation that will ensue if union salts are accorded employee protection and an employer seeks to exclude them from a bargaining unit on the basis of their "temporary" employment status.¹⁹ Unless the rights afforded by Section 7 of the Act. There is no

¹⁸ The NLRB makes this argument in its decision below, 309 NLRB at 1256-1257.

¹⁹ The NLRB has established very broad voter eligibility standards for the construction industry. The basic NLRB construction industry standard was stated in *Daniel Construction Company*, 133 NLRB 264 (1961), modified at 167 NLRB 1078 (1967), and recently affirmed in *Steiny and Company, Inc.*, 308 NLRB No. 190 (1992). The *Daniel-Steiny* standards generally provide that construction workers are eligible to vote if they have been employed for thirty working days or more within the twelve months immediately preceding the eligibility date for the election or, if they had some employment in those twelve months, have been employed for forty-

NLRB chooses to engage in rule-making and exclude all union salts from the proposed bargaining unit in any representation election under Section 9, the temporary status and community of interest questions surrounding the salts must be litigated in every representation case. To make matters worse, the representation hearing would prove little, because the union salt cannot honestly testify about his or her future employment with the contractor, because the salt simply does not and cannot know when the union will direct the salt to quit.

Can the employer similarly plant its own paid officials or operatives in the bargaining unit to accomplish the same purpose as the union salts, i.e., placing extraordinary and undue strain upon the "true" employees in the unit? It is inconceivable that the Board would permit an employer to place its labor relations vice president or similar high-ranking official into the bargaining unit for the purpose of "organizing" the employees in an effort to defeat the union. It is similarly unbelievable that the Board would permit the employer to pay another person, or persons, to obtain the same objective as the union salts. Yet, what is the difference between this scenario and the one at bar? There is none.

Similarly, it would not be lawful for an employer to spy upon the union salts' activities. This would clearly violate established Board precedent under Section 8(a)(1) of the Act. Yet, by according Section 2(3) status to the union salt, the Board is allowing similar conduct by these individuals against management.

For these reasons, the balance sought by Congress between the conflicting concerns of labor and management in Sections 7 and 9 of the Act will be severely corrupted if the salts are accorded Section 2(3) employee status.

five working days or more within the twenty-four month period immediately preceding the election's eligibility date. It would not be very difficult for a union salt employed on most construction projects to easily meet this standard.

VI. AN EMPLOYER SHOULD NOT BE COMPELLED TO HIRE PAID UNION AGENTS, EVEN IF THEY ARE HELD TO BE EMPLOYEES, DURING A SALT-ING OR COMET-TYPE CAMPAIGN.

Even if paid salts of the IBEW are considered to be employees within the definition of Section 2(3), contractors should not have to employ them due to the inherent conflict of interests and the destruction to the balance between unions and employers that the Act is designed to maintain. The NLRB in *Sunland Construction Company, Inc.*, 309 NLRB 1224 (1992), the companion case with Respondents' at the NLRB, held that a paid organizer was an employee under the Act, but that the employer could refuse to hire him during a strike.²⁰ The NLRB so held due to the conflict between an employer's interest in continuing operations and a union's interest in getting employees to withhold their services during a strike. There is little difference between the conflict during a strike and the constant threat, whether announced or not, that a union will direct its salts to stop working at crucial times during a construction project. Due to the dictates of the salting resolution, the salts must stop immediately when directed to do so.

In addition to the constant threat that union salts will be removed from the job site at the whim of the union, the whole purpose of salting in this case, as well as under the COMET campaign, is to create intense conflict with management. An example of the attitude which "good salts" should maintain is described in an organization manual entitled, *A Troublemaker's Handbook: How to Fight Back Where You Work—And Win!*, [A Labor Notes Book, Detroit, 1991], which states at page 9:

Organizing begins when people question authority Organizing is about changing power relationships, changing the balance of forces between management and workers. Confrontation with the employer has to be built into the escalating activities.

²⁰ 309 NLRB at 1230-1231.

In fact, the conflict during a salting campaign can disrupt a contractor's operations more than a strike.²¹ Since the conflict is intense, it is implausible that Congress intended to require an open-shop contractor to employ a paid or subsidized union agent during a campaign designed to organize or harass the contractor while on its payroll.

VII. THE EIGHTH CIRCUIT'S DECISION IS WELL-REASONED AND UPHOLDS THE ACT'S PURPOSES.

Various Courts of Appeals have rejected the Board's interpretation of Section 2(3) as applying to paid union agents. The first such rejection occurred in *NLRB v. Elias Brothers Big Boy, Inc.*, 327 F.2d 421 (6th Cir. 1964). More recently, the Fourth Circuit has held that Section 2(3) does not include union salts. *H.B. Zachry Co. v. NLRB*, 886 F.2d 70 (4th Cir. 1989); *Ultrasystems Western Constructors, Inc. v. NLRB*, 18 F.3d 251 (4th Cir. 1994). The Eighth Circuit relied heavily upon *H.B. Zachry* in this case. *Town & Country Electric, Inc. v. NLRB*, 34 F.3d 625 (8th Cir. 1994).

Both *H.B. Zachry* and *Town & Country Electric* provide detailed reasoning as to the logical exclusion of union salts from "employee" protection under the Act. In opposition to this viewpoint, the District of Columbia Court of Appeals decision in *Willmar Electric Service, Inc. v. NLRB*, 968 F.2d 1327 (D.C. Cir. 1992), cert. den'd 113 S.Ct. 1252 (1993) provides the most cogent conflicting decision. The Second Circuit in *NLRB v. Henlopen Manufacturing Company*, 559 F.2d 26, 30 (2nd Cir. 1979) and the Third Circuit in *Escada (U.S.A.) Inc. v. NLRB*, 970 F.2d 898 (3rd Cir. 1992) enforced the Board's interpretation without significant comment.

In *Willmar Electric Service, Inc.*, the District of Columbia relied heavily upon the expansive meaning of "employee" generally, without any comment on this Court's decisions that have excluded classes of persons (retired

²¹ For example, see Professor Herbert R. Northrup's article referenced in footnote 10 herein. See also, Robert Tomsho's article referenced in footnote 9.

employees, managerial employees) from protection.²⁰ The D.C. Circuit gave short shrift, without adequate consideration, to the fears expressed in *H.B. Zachry* that the inclusion of union salts in Section 2(3) would disrupt the representation process. However, as was noted in Section V above, the D.C. Circuit's belief that union salts could be omitted from the bargaining unit in any representation election is naive. If the true intention of the union salts is to organize the non-union employer, is it not reasonable to assume that the unions would insist upon the inclusion of such persons in the bargaining unit for any representation election?

The gravamen of the D.C. Circuit's analysis is its belief that there is no difference between a union salt and a typical union zealot who was employed by the non-union contractor and the fact that there was no question that the latter was protected by Section 2(3). (See 968 F.2d at 1329, 1330). However, as demonstrated herein, there is a fundamental difference between the union salt and the union zealot. The former is under the direct and ultimate control of his union, while the latter is not. A person can be a union zealot of his own free choice and volition; yet, that person also has ultimate control over his or her job performance, the duration of his or her

²² The D.C. Circuit noted that concurrent employment by a union and employer could have been expressly authorized by Section 302(c)(1) of the Act, which generally exempts certain payments from an employer to an employee of a union from the general prohibitions of Section 302. Section 302(c)(1), 29 U.S.C. § 186(c)(1) expressly excepts from the general payment ban a payment to an "employee of a labor organization, who is also an employee . . . of such employer, as compensation for, or by reason of, his service as an employee of such employer." However, the exception contained in Section 302(c)(1) obviously pertains to payments or benefits to a union steward or union employee who is employed under a collective bargaining relationship between the employer and a union. Simultaneous employment with an employer and a labor union typically occurs when a collective bargaining relationship has been established between the two sides, and a collective bargaining agreement is in place. However, Section 302(c)(1) does not offer support for the general proposition that union salts should be covered by Section 2(3).

employment, and for whom he or she may work. The union salt has no such control.

The very essence of an employer-employee relationship is that the employer expects the individual to work for an indeterminate period of time and will comply with the employer's supervision, while the employee decides whether working for the employer is in his or her best interest. When ultimate control over the employment relationship is not in the hands of the employer and employee, but rather the union, the foundation of this relationship vanishes.

The objective of the Act and the purpose of the NLRB are to protect the free choice of employees, not to protect or advance the interests of employers or unions. It is this balance, as well as the realities of the construction industry, that the Eighth Circuit recognized in its sapient decision below and sought to achieve. Amicus AGC submits that the Eighth Circuit's approach and decision is compatible with the Act, this Court's decision in *Lechmere*, and is a rational analysis of the problem presented by union agents masquerading as employees.

CONCLUSION

For the reasons stated hereinabove, amicus AGC urges this Court to affirm the judgment of the Eighth Circuit below, and to deny enforcement of the NLRB's order herein against the Respondents.

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In The
Supreme Court of the United States

October Term, 1994

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

TOWN & COUNTRY ELECTRIC, INC., AND
AMERISTAFF PERSONNEL CONTRACTORS, LTD.,

Respondents.

On Writ Of Certiorari To the
United States Court Of Appeals
For The Eighth Circuit

BRIEF AMICUS CURIAE OF THE
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In The
Supreme Court of the United States

October Term, 1994

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

TOWN & COUNTRY ELECTRIC, INC., AND
AMERISTAFF PERSONNEL CONTRACTORS, LTD.,

Respondents.

On Writ Of Certiorari To the
United States Court Of Appeals
For The Eighth Circuit

BRIEF AMICUS CURIAE OF THE
CHAMBER OF COMMERCE OF THE UNITED STATES
OF AMERICA IN SUPPORT OF THE RESPONDENTS

INTEREST OF THE AMICUS CURIAE¹

The Chamber of Commerce of the United States of America ("the Chamber") is a federation consisting of approximately 215,000 companies and several thousand other organizations such as state and local chambers of commerce and trade and professional associations. It is

¹ This brief is filed with the written consent of the parties pursuant to Supreme Court Rule 37.3. Letters of consent are being filed simultaneously with the Clerk of Court.

the largest association of business and professional organizations in the United States.

A significant aspect of the Chamber's activities involves regular representation of the interests of its member-employers before the courts, the United States Congress, the Executive Branch and independent regulatory agencies of the federal government. Accordingly, the Chamber has sought to advance those interests by filing briefs *amicus curiae* in a wide spectrum of labor relations litigation.²

This case presents the fundamental question of whether the National Labor Relations Act ("NLRA" or "the Act") requires an employer to consider for hire paid union agents who have been sent by the union to seek employment with the employer for organizational purposes and who, if hired, will remain with the employer only so long as the union permits them to do so. The resolution of this issue presents, *inter alia*, the question of whether these paid union agents are "employees" as defined by Section 2(3) of the NLRA, 29 U.S.C. § 152(3). The Board held that Respondents, as employers, must hire such individuals, despite the fact that their employment was, by agreement with the union, only for organizational purposes, their salary would be subsidized by

² See, e.g., *Livadas v. Bradshaw*, ___ U.S. ___, 114 S.Ct. 2068 (1994); *ABF Freight Sys., Inc. v. NLRB*, ___ U.S. ___, 114 S.Ct. 835 (1994); *Lingle v. Norge Div. of Magic Chef, Inc.*, 486 U.S. 399 (1988); *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27 (1987); *Golden State Transit Corp. v. Los Angeles*, 475 U.S. 608 (1986); *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202 (1985); *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111 (1985).

the union, and the duration of their employment would be determined by the union. The Eighth Circuit Court of Appeals rejected the Board's position as an unreasonable interpretation of the Act and held such paid union organizers to be outside of the NLRA's definition of "employee."

The Court's resolution of this matter is of vital concern to the Chamber and its members, many of whom are non-unionized companies that are receiving employment applications from paid union organizers whose primary interest in gaining employment is not to work for the companies, but to organize their workforces for the benefit of the union. These employers need to know whether they must consider such paid union organizers as legitimate job applicants whom they must hire and retain in their workforce as the Board held, or whether they need not be treated as *bona fide* employees or applicants because of their union-employer's control over them.

SUMMARY OF THE CASE

Respondent, Town & Country Electric, Inc. ("Town & Country"), is a Wisconsin-based electrical contracting company. Malcolm Hansen, a Minnesota State licensed journeyman electrician, is a member of Local 292 of the International Brotherhood of Electrical Workers ("Local 292" or "the union"). In September of 1989, Local 292, acting pursuant to its "job salting organizing resolution," encouraged Hansen and some nine other Local 292 members to seek jobs on a non-union Town & Country project

in International Falls, Minnesota. According to the resolution, members of the Local who received approval from the union could seek jobs on non-union projects, like Town & Country's, for the purpose of "organizing the unorganized." Members who were successful in obtaining such employment were required to "promptly and diligently carry out their organizing assignments, and leave the employer or job immediately upon notification [by the union]." In return for the organizers' efforts, the union had to pay them the difference between union scale and the non-union contractor's wage rate, and also had to pay for the organizers' travel expenses.

On September 7, 1989, Hansen, accompanied by approximately nine other Local 292 members and two full-time paid union officials, went to a hotel in Minneapolis, Minnesota, where Town & Country officials were scheduled to interview applicants who had been pre-screened by Ameristaff, an employment agency.³ None of the individuals from Local 292 had been pre-screened for interviews, although Hansen had called Ameristaff on the morning of September 7 and had been instructed to go to the hotel.

³ Shortly after being awarded the contract in early September, 1989, Town & Country learned that Minnesota law requires electrical contractors to employ one State-licensed electrician for every two on the job site who lack such licenses. Because Town & Country had no employees who met this requirement, it retained Ameristaff to recruit personnel for the job. Those recruited would be employees of Ameristaff, not Town & Country. Local 292 officials learned of the job through an advertisement placed by Ameristaff.

Town & Country's representatives for these interviews, human resources manager Ron Sager and project manager Dennis Defferding, were delayed in Wisconsin by inclement weather, and arrived at the hotel in Minneapolis one and one-half hours late. By the time they arrived, of the seven pre-screened interviewees, only one remained, along with the dozen applicants sent by the union. Sager and Defferding interviewed one union applicant, who stated that he had to leave early, and the one scheduled applicant who had remained. They then informed the others, whom their applications showed to be union members, that Sager had to return to Wisconsin for an important meeting and that only scheduled applicants would be interviewed. Hansen, however, demanded to be interviewed because he had been told that morning by Ameristaff to come to the hotel. Sager then interviewed Hansen and, although knowing that he was a union member, hired him. Hansen thus became an Ameristaff "employee."

On September 12, Town & Country's crew, including Hansen, began work at the site. The same day, Hansen announced to the crew that he was there to organize them for the union. Thereafter, Hansen's crewmates complained to their foreman about Hansen's workplace behavior, including his organizing efforts and his poor productivity.

On September 14, Town & Country learned that Minnesota law prohibits electrical contractors from using employment agency employees on the job. Hansen was therefore informed by his foreman that he was terminated, and his request that he be hired by Town & Country was refused. The union thereupon filed unfair labor

practice charges against Town & Country, alleging that the Company violated Sections 8(a)(1) and 8(a)(3) of the NLRA, 29 U.S.C. §§ 158(a)(1) and 158(a)(3), by refusing, on September 7, to interview the two union officials and the other union members sent by Local 292, and by refusing to retain Malcolm Hansen on the job after September 14.

The Board found in favor of the union in all respects. In so doing, the Board adhered to its view that under the NLRA paid union organizers, although dispatched to a targeted employer for the express purpose of fulfilling organizational responsibilities to the union while in the guise of *bona fide* employees, are indistinguishable from any other job applicant or employee. The Board accordingly concluded that a targeted employer, like Town & Country, may not refuse to hire such union agents or dismiss them for engaging in paid organizing activity at the employer's worksite. The Eighth Circuit, citing with approval the Fourth Circuit's decision in *H.B. Zachry v. NLRB*, 886 F.2d 70 (1984), and the Sixth Circuit's decision in *NLRB v. Elias Brothers Big Boy, Inc.*, 327 F.2d 421 (6th Cir. 1964), refused to enforce the Board's order, concluding that individuals who are paid and controlled by a union that has targeted an employer for organization are not "employees" under the NLRA.

SUMMARY OF THE ARGUMENT

The NLRB's conclusion that an employer is required to hire paid union organizers of a union that has targeted that employer for organization is an unreasonable and

arbitrary interpretation of the Act. A requirement that employers must hire the paid agents of their adversary in organizing activities is at odds with the fundamental balance in the statute between the roles of employers, employees and labor organizations. In addition, the Board's requirement that employers must allow paid union operatives to work side by side with the rank and file members of a potential bargaining unit is inconsistent with numerous principles articulated under the NLRA that are designed to protect fundamental fairness and freedom of choice. The unreasonableness of the Board's rule requiring a targeted employer to hire paid organizers of the union targeting him is underscored by the Board's arbitrary distinction not applying the same rule in a strike situation, an exception unsupported by the statute and by the Board's experience in administering the statute.

Moreover, the language of the statute itself supports the conclusion that paid union organizers are not "employees" when they are acting as the paid agents of a labor organization and have presented themselves for employment to a targeted employer in furtherance of their paid organizational duties.

I. THE BOARD'S CONCLUSION THAT AN EMPLOYER IS REQUIRED BY LAW TO HIRE THE PAID ORGANIZERS OF A UNION THAT HAS TARGETED THAT EMPLOYER FOR ORGANIZATION IS AN UNREASONABLE INTERPRETATION OF THE ACT.

As the court of appeals recognized, it is settled that the Board, as the agency charged with interpreting the

NLRA, is entitled to deference in its interpretation of the statute only if that interpretation is reasonable in light of the terms, structure and policies of the Act. *See Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 891 (1984). *See also Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984) (where the statute is silent or ambiguous, agency's interpretation is upheld if it is a permissible construction of the statute). The NLRB is not entitled to deference, however, in a case such as the one here, where the Board unabashedly has ignored the distinct roles of employers, employees and unions carefully cast by Congress, and has articulated a rule that conflicts with numerous other provisions and principles of the statute. As we show in Section II, *infra*, there is even support in the text of the Act for the court of appeals' conclusion that paid union organizers who seek a job with a targeted employer on behalf of the targeting union are excluded from the definition of "employee." In such circumstances, it is clear that the Board's conclusion that paid union organizers must be hired by a targeted employer during an organizing drive is at odds with the terms, structure and fundamental policies of the statute.

A. The Principle of Balance Struck by Congress in the NLRA Between Labor and Management Demonstrates that an Employer is not Required to Hire the Paid Agents of the Union that has Targeted It for Organization.

Even a cursory analysis of the structure of the NLRA shows why the Board was wrong to conclude that paid union organizers who have targeted an employer for organization must be hired by that employer. By design,

employers, unions, and employees constitute three distinct groups under the NLRA. The major emphasis of the Act is to protect the rights of employees by keeping employee interests distinct from those of employers and of unions. *Lechmere, Inc. v. NLRB*, 502 U.S. 527, 532 (1992). The paramount employee right under the NLRA is the Section 7 right to form, join, or assist labor organizations or to refrain from doing so. 29 U.S.C. § 157. Unions and employers have the right to convince employees legitimately that they either should or should not support a union, but neither has the right to make that decision for employees. *Lechmere*, 502 U.S. at 532.

Recognizing that employee interests are best served by independent persuasion from labor and management, Congress carefully separated the roles of unions and employers under the statute and designed the NLRA to keep either from interfering with the independence of the other. There are numerous examples of the independent, and at times adversarial, roles that are delineated for employers and unions under the NLRA.

A first principle of the NLRA is that labor and management may not dictate who shall be the collective bargaining agents of the other. *See generally General Electric Co. v. NLRB*, 412 F.2d 512, 516-17 (2d Cir. 1969) (discussing fundamental right of both employers and employees to choose their own bargaining representatives). Consistent with this principle, the NLRA prohibits an employer from interfering "with the formation or administration of any labor organization." 29 U.S.C. § 158(a)(2). An employer violates that section of the Act if its managers and supervisors play a meaningful role in the selection of a union as the employees' bargaining representative. *Int'l*

Assoc. of Machinists v. NLRB, 311 U.S. 72, 79-80 (1940); *H.J. Heinz Co. v. NLRB*, 311 U.S. 514, 519-20 (1941). Similarly, the Act prohibits a labor organization from restraining management in the selection of its representatives. 29 U.S.C. § 158(b)(1)(B); *NLRB v. Amax Coal Co.*, 453 U.S. 322, 334-335 (1981).

Further evidence of the independent and distinct roles occupied by employers and unions under the Act is that no union is required to bargain with an employer about the union's rules of membership, 29 U.S.C. § 158(b)(1)(A) (proviso); *Betra Mfg. Co.*, 233 NLRB 1126, 1135 (1977), *enf'd*, 624 F.2d 192 (9th Cir. 1980), *cert. denied sub nom*, *Thomas v. NLRB*, 450 U.S. 996 (1981); *NLRB v. Corsicana Cotton Mills*, 178 F.2d 344 (5th Cir. 1949); *Zayre Dep't Stores*, 289 NLRB 1183, 1186 (1988). By the same token, management is not required to bargain with a union about the individuals the employer hires, *Star Tribune*, 295 NLRB 543, 547-48 (1989); *United Technologies Corp.*, 274 NLRB 1069, 1070 (1985), *enf'd*, 789 F.2d 121 (2d Cir. 1986), or about the employer's basic decisions on how it will run its business. *First Nat'l Maintenance Corp. v. NLRB*, 452 U.S. 666 (1981). See also *Dubuque Packing Co., Inc.*, 303 NLRB 386 (1991), *enf'd in relevant part*, 1 F.3d 24 (D.C. Cir. 1993).

The NLRA has been construed to allow an employer to discharge its managers and supervisors who support union representation. E.g., *Parker-Robb Chevrolet, Inc.*, 262 NLRB 402 (1982), *review denied sub nom*, *Auto Salesmen's Union Local 1095 v. NLRB*, 711 F.2d 383 (D.C. Cir. 1983). Similarly, a union may expel its members who aid management by working during a strike. *Scofield v. NLRB*, 394 U.S. 423, 430 (1969).

Furthermore, an employer may permit its managers and supervisors to join a union, but it is not required by the Act to do so. *NLRB v. News Syndicate Co.*, 365 U.S. 695, 699 n.2 (1961). At the same time, a union is not required to accept a management representative into its ranks, although it may do so voluntarily. *Id.* See also *Sakrete of N. Cal., Inc. v. NLRB*, 332 F.2d 902, 908 (9th Cir. 1964), *cert. denied*, 379 U.S. 961 (1965). Cf. *Reich v. Int'l Alliance of Theatrical Stage Employees*, 32 F.3d 512, 515 (11th Cir. 1994) (observing that union's prohibition on a managerial employee-member having a voice or vote in union business appropriately avoids "a conflict of interest in [the individual] carrying out his duties for the union, on the one hand, and his employer, on the other.").

Given the foregoing principles, it is inconceivable that Congress nevertheless could have intended that an employer would be *required* to hire full-time union organizers paid and controlled by the union even though the employer knows that the organizers' express purpose in applying for jobs is to drum up support for the union. Indeed, it is apparent that the conclusion of the Board in this case is in direct conflict with core tenets of the NLRA. It is only by unreasonably equating paid union activity with the Section 7 right of employees to form, join, or assist a labor organization, and by giving no meaningful consideration to the balancing principles upon which the Act is based, that the Board could come to the remarkable conclusion that a targeted employer must hire a paid union adversary.⁴

⁴ Thus, the Board miscasts the challenge to the "employee" status of paid union organizers as an attack on the premise that

This Court, in *Lechmere*, *supra*, reiterated that union organizers could not use the Section 7 rights of the employees they sought to organize to excuse their trespass onto an employer's property. *Lechmere*, 502 U.S. at 537. Nonetheless, the Board concluded here that the union can assume the rights of employees by the simple expedient of directing its paid agents to apply for employment with a non-unionized company. But this dispatch of its agents to the employer's work site, employment applications in hand, no more changes the character of the union's right than if an employer sent its supervisors to apply for a job with a union and thereby attempted to vest them with "employee" status for the purpose of advancing the employer's opposition to unionization from within the union. Neither the union nor the employer should be permitted to gain

employees can be both loyal to their union and to their employer. *Town & Country Elec.*, 309 NLRB 1250, 1257 (1992), *enf'd denied*, 34 F.3d 625 (8th Cir. 1994). In the same vein, it mischaracterizes the arguments in support of this challenge as "arguments that employers be permitted to discriminate based on an individual's presumed or avowed intention to join or assist a labor organization." *Id.* 1256. The briefs of the Board and its *amici* in this Court continue this theme.

Neither of these characterizations is accurate or useful. There is no question that employees may be both loyal union adherents and loyal employees and that the right to join unions and to assist labor organizations is fundamental. Those principles are not at issue. Rather, what is at issue is whether a paid operative of a union that has targeted an employer for organization, who seeks to work for the employer to further the union's objectives, and whose duration of employment is controlled by the union's agenda, and not by the individual's or the employer's requirements, is a *bona fide* "employee" who must be hired and retained.

"employee" status for its paid agents through such stratagems.

Moreover, as the Fourth Circuit recognized in *H.B. Zachry Co. v. NLRB*, *supra*, the requirement that an employer accept into its ranks paid union organizers, particularly during a representation campaign, effectively requires the employer to subsidize the organizational activities of the union that, by statute, it is privileged to oppose. *Zachry*, 886 F.2d at 75. In like manner, Congress, in Section 8(a)(2) of the Act, 29 U.S.C. § 158(a)(2), sought to maintain the independence of unions for the benefit of employees by prohibiting employers from funding their efforts.

The Board cursorily dismisses the latter prohibition, stating that Section 8(a)(2) would not be violated by such employer "support" for the union because organizers would be paid for work performed for the employer, not for their organizing activities. *See Town & Country*, *supra*, 309 NLRB at 1257-58 n.36. Such analysis begs the question, however, because it ignores the statutory policy embodied in Section 8(a)(2) that in the realm of organizing, most employers and unions are adversaries – competitors for the sympathies of the employees. No competitor should effectively be *required* to subsidize the competition. Yet, the decision of the Board ignores logic and the very fabric of the NLRA by requiring such an untoward result.

In sum, the basic structure of the Act clearly supports the conclusion that the paid organizers of a union that has targeted an employer for organization need not be

hired by that employer, whatever their technical status under the Act.⁵

B. Other Settled Principles of the NLRA are Violated by the Board's Conclusion that the Pay and Control Exercised by a Union Over Its Organizers do not Present Disabling Conflicts of Interest.

The erroneous nature of the Board's decision in this case is highlighted by its decision in *Sunland Construction Co.*, 309 NLRB 1224, 1230-31 (1992), a companion case to

⁵ The Board and its *amici* argue that NLRA Section 2(3)'s broad definition of "employee," when considered in light of the list of exclusions set forth therein, mandate that "paid union organizers" be classified as statutory employees, given that they allegedly are not among the groups expressly excluded. Petitioner and its *amici* base this contention on the "expressio unius est exclusio alterius" principle of statutory construction, that is, the inclusion of one thing negatively implies the exclusion of others. As we show in Section II, the text of the Act supports the proposition that paid union organizers are excluded from the Act by operation of Sections 2(2) and 2(3). Yet, even were this not the case, other categories of workers have been determined to be outside the protection of the Act despite their absence from Section 2(3)'s list of exclusions. See *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 289 (1974) (holding, contrary to the Board's conclusion, that all managerial employees are excluded from Section 2(3)'s definition of employee); *Cedars-Sinai Medical Center*, 223 NLRB 251 (1976) (holding that medical residents and medical interns are excluded from the NLRA definition of employee). Thus, even if Congress failed to expressly exclude "paid union organizers" from Section 2(3), this is not dispositive of Congress' intent on the issue, particularly where, as here, a contrary result is inconsistent with the fundamental policies of the statute.

Town & Country before the Board. In *Sunland*, the Board held that an employer may refuse to hire a paid union organizer during a strike without violating the NLRA. The Board reasoned that the conflict of interest between the employer and the union justified the employer's refusal to hire the organizer based upon his paid union status, saying: "[the union agent's] interest and objectives . . . were [presumptively] aligned with the Union – on whose behest he acted." *Id.* at 1231. Emphasizing the point, the Board also noted that an employer could not presume that *unpaid* union adherents who applied to work behind a picket line operated under such a disabling conflict "because they are not obligated to the union as paid agents." *Id.* n.41.⁶

The paradox is that in *Sunland*, the Board acknowledged that a fundamental divergence of interests exists between unions and employers. According to the Board, an employer is privileged to presume that the union's motive is illicit and at odds with the employer's desire to operate when the union sends its agents into the employer's workforce during a strike. In such an instance, the employer need not hire an applicant who is a paid union organizer. Inexplicably, however, the Board would forestall an employer targeted by a union for organization from drawing a negative inference about the union's motives in sending its paid operatives to work for the employer in the absence of a strike.

⁶ In *Sunland*, the Board, as in this case, found paid union organizers to be Section 2(3) "employees." In this respect, the Board's conclusions in the cases cannot be reconciled.

The Chamber submits that the Board's demarcation between a strike situation and a non-strike (organizing) situation is utterly untenable. For example, if paid union organizers must be hired by a targeted employer before a picket line is erected as the Board holds, then all a union need do is send its agents to apply for work before a strike is called, and if qualified for the job, they must be hired by the employer. Presumably, the union could then call a strike, instruct its operatives to continue to work behind the picket line, and the Board, predicated on *Sunland*, would then permit the targeted employer to terminate the same paid organizers who, under the Board's doctrine in this case, the employer was compelled to hire originally. A similar absurd result follows that paid union organizers may be discharged if they, at the union's direction or urging, engage in lesser forms of economic activity against the employer, such as a protected "sit-down" strike. See *Overhead Door Corp.*, 220 NLRB 431 (1975) (finding employees' refusal to leave plant at the end of shift to protest change in working hours to be protected conduct), *enf'd denied in relevant part*, 540 F.2d 878 (7th Cir. 1976). See also *Peck, Inc.*, 226 NLRB 1174 (1976) (affirming continued adherence to rule in *Overhead Door*). It does violence to the Act to permit the irreconcilable conflict between paid union organizers and targeted employers to be acted upon only in the strike situation.⁷

⁷ Thus, the Board's distinction requires it to disregard that striking is protected activity under Section 7 of the Act, 29 U.S.C. § 157; that under Section 2(3) of the Act, "employees" do not lose their status by exercising their right to strike, 29 U.S.C. § 152(3); see also *Laidlaw Corp.*, 171 NLRB 1366 (1968), *enf'd*, 414

In contrast with the Board, the administrative law judge in the *Sunland* case⁸ realistically recognized that conflicting agendas are equally possible in both the strike and the organizing context:

It is not farfetched to regard the [union's] "strike back" strategy as built upon a form of entrapment reminiscent of other "blackmail" devices which in 1958 led to enactment of the Section 8(b)(7) strictures on recognition picketing. . . . [In this case], the employee protections of Section 8(a)(3) were central ingredients of a scheme whereby an unorganized employer would be pressured to capitulate, go out of business, or face recurring union sponsorship of mass applications in the midst of future projects. From my perspective, a serious question arises as to whether, through the complaint in this proceeding, the Board has been conscripted as

F.2d 99 (7th Cir. 1969), *cert. denied*, 397 U.S. 920 (1970); and that nothing in the NLRA "shall be construed so as either to interfere with or impede or diminish in any way the right to strike," 29 U.S.C. § 163. Similarly, both employers and unions are prohibited under the Act from discriminating against employees who exercise their right to strike. 29 U.S.C. §§ 158(a)(1), 158(b)(1)(A). It is precisely because fundamental employee rights under the Act must be disregarded in order for the Board's distinction to work that the Board was wrong to conclude that a paid union organizer is a *bona fide* applicant or employee of a targeted employer at any time.

⁸ In *Sunland*, the Board disavowed reliance on the administrative law judge's discussion of the motives of the union in inundating the employer with applications of union organizers. Yet, the ALJ's candid assessment is entitled to much weight, because it demonstrates the falsity of the distinction that the Board would draw between the strike situation and "business as usual."

an unwitting conspirator in the effort to achieve union goals – be they organizational or economic – through pressures, rather than through the statutory procedures designed to assure that compulsory bargaining begins with procedures preserving freedom of choice.

Sunland Constr. Co., 309 NLRB at 1245 (decision of ALJ Harmatz).⁹

By acknowledging that the control exercised by the union over its organizers makes them different in kind from other laborers in the strike context, but then failing to account for those differences in the organizing context, the Board clearly reaches an unreasonable interpretation of the Act. For in each case, unions and employers should properly be viewed as "separate factions in warring camps." *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 278 (1974), quoting *Packard Motor Car Co. v. NLRB*, 330 U.S. 485, 494 (1947). Just as an employer need not hire a paid union organizer to work behind a picket line, so too an employer should have a right to refuse to hire – and, therefore, not to pay – individuals who are concurrently employed by a union adversary to enter the employer's workplace for the express purpose of furthering the union's interests at the location. Cf., e.g., *Lucky Stores, Inc.*, 269 NLRB 942 (1984) (permissible to terminate a confidential employee based on the presumption that close marital or social relationship to a union adherent might

⁹ ALJ Harmatz recognized the particular vulnerability of a construction employer to this tactic if he is targeted by a union when nearing his contract deadline to complete a job, because normally such contractors are subject to stiff monetary penalties for delay. 309 NLRB at 1245.

improperly disclose confidential labor relations information to union); *Joseph Schlitz Brewing Co.*, 211 NLRB 799 (1974) (same).

A conclusion that an employer need not hire a paid union organizer who only will remain with the employer so long as the union permits him to do so is consistent not only with the NLRA, but also accords with common law agency principles, which recognize that such divided loyalty is inconsistent with the normal master-servant relationship. See Restatement (Second) Agency § 226, comment a ("giving service to two masters at the same time normally involves a breach of duty by the servant to one or both."). See also *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 112 S.Ct. 1344, 1349 (1992) (observing that construing the employer-employee relationship under the NLRA "to imply something broader than the common-law" thwarts congressional intent); H.R. Rep. 245, 80th Cong., 1st Sess. at 18 (1947), reprinted in 1 Legislative History of the National Labor Relations Act, 1947, 309 (admonishing courts to apply the common law rules when construing the master-servant relationship under the statute because "Congress . . . intends . . . that the Board give to words not far-fetched meanings but ordinary meanings").

What the Board seemingly fails to comprehend is that where union pay and union control motivate the organizer's conduct, the organizer is acting as an agent of the employer's adversary, not as a run-of-the-mill pro-union employee. As such, irrespective of whether a paid union organizer technically falls within the NLRA definition of "employee," a targeted employer should be privileged to refuse to hire the union agent on the presumption that the

union's conflicting interests ultimately will be given precedence. Cf. *Emanuel Hospital*, 268 NLRB 1344, 1348 (1984) ("suspicion, doubt or fear" that employee with potential conflict of interest will act in derogation of employer's interest is sufficient basis to take action against employee). Cf. also *Wild v. United States Dep't of Housing and Urban Dev.*, 692 F.2d 1129, 1133 (7th Cir. 1982) (where employee's off-duty behavior is in conflict with employer's mission, employer could reasonably terminate him, as, for example, "[i]f a union officer of a musicians' union owned a nightclub that employed non-union musicians"). To conclude otherwise, as did the Board in this case, is to exalt form over substance and to ignore the realities of the workplace.

Additionally, determining that an employer need not hire the paid organizers of a union safeguards the right of *bona fide* employees to freely choose whether or not they wish to be represented by a union. It cannot be disputed that the right to take part in free and fair elections is crucial to realization of the Section 7 right to organize or to refrain from organization. This right is necessarily impaired by the Board's construction of the statute in this case because, under the Board's view, paid union organizers might well be permitted to vote in a representation election brought by the union paying them. See *Dee Knitting Mills*, 214 NLRB 1041 (1974), *enf'd*, 538 F.2d 312 (2d Cir. 1975). Thus, the Section 7 rights of legitimate employees clearly are threatened by the Board's rule.

Yet, even if paid union organizers were to be excluded from such an election, there is harm to the *bona fide* employees' section 7 rights merely through the thrusting of the paid union agents among their ranks. For,

moving about in the guise of rank and file employees, the paid union agents are apt to "paint a false portrait of employee support during the representation campaign." *NLRB v. Savair Mfg. Co.*, 414 U.S. 270, 277 (1973). The results of the election may be tainted thereby. Moreover, it is well recognized that employees who are choosing whether or not to be represented by a union are entitled to know the character and scope of the unit in which they will be included. See, e.g., *NLRB v. Parsons School of Design*, 793 F.2d 503, 507-08 (2d Cir. 1986); *NLRB v. Lorimar Productions, Inc.*, 771 F.2d 1294, 1301 (9th Cir. 1985). If paid union organizers populate the ranks of a targeted workforce in sufficient numbers, in addition to the false portrait of support that they will paint, they will distort the character and scope of the actual bargaining unit and bargaining unit employees likely will become confused about the role of "employee" organizers in the collective bargaining process.

On the other hand, a holding that paid union agents, like Hansen, do not have the right to engage in paid organizing at an employer's workplace is not tantamount to permitting employers to discriminate against *bona fide* employees who engage in union activity. Nor will it chill the rights of such employees to form, join, and assist labor organizations. *Bona fide* employees, who have a stake in the employer's enterprise, and who will endure the consequences of whatever representation choice is ultimately made by the employee group, will still enjoy all of the rights afforded them under the NLRA. Unions still will be able to appeal legitimately to employees within the broad parameters permitted by the Act. Unions simply will not be able to require employers to

subsidize their position by the forced employment of individuals whose interest in and loyalty to the employer is dictated by the union's agenda.

II. PAID UNION ORGANIZERS ARE NOT "EMPLOYEES" UNDER THE LANGUAGE OF SECTION 2(3) OF THE ACT.

Where a statute is clear, the agency charged with interpreting it is bound to apply it as written and the reviewing court, in turn, should accord no deference to an agency's determination. *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984) (reasoning that where Congress has spoken on the precise issue, deference is inappropriate); *NLRB v. Hearst Pub., Inc.*, 322 U.S. 111, 130-31 (1944) (same). Cf. *Marbury v. Madison*, 5 U.S. 137, 177 (1803) ("[i]t is emphatically the province and duty of the judicial department to say what the law is").

The Chamber submits the text of the NLRA supports the Eighth Circuit's conclusion that paid union organizers are not "employees" when they present themselves for employment to a targeted employer. The Chamber believes that paid union organizers are excluded from NLRA Section 2(3) when they act in this capacity. Accordingly, the Board's contrary interpretation of the NLRA is a misreading of the statute and is entitled to no deference by the Court.¹⁰

¹⁰ Although the Brief of Local 292 on the merits (note 17 therein) disingenuously implies that the Board's position on the employee status of paid union organizers dates back to the

Section 2 of the NLRA, defines, *inter alia*, the terms "employer," "employee" and "labor organization." Each entity is recognized as distinct and apart from the others

1930s, the Board cannot be said to have announced its position on the status of that group until the 1960s, in a footnote that the Board candidly described as *dictum* in *Sears, Roebuck and Co.*, 170 NLRB 533, 535 n.3 (1968), stating "[a]s long as the employee gives a full day's work to his 'regular' employer, the fact that he renders services in other hours to the Union does not affect his employee status, whether such latter services are paid or not." See also *Elias Bros. Big Boy, Inc.*, 139 NLRB 1158, 1165 (1962) (Board adopting without opinion the ALJ's recommended decision in which he concluded that, on the facts presented, a waitress who received a nominal sum from the union for expenses incurred in organizational efforts did not thereby lose her employee status), *enf'd denied in relevant part*, 327 F.2d 421 (6th Cir. 1963). In *Dee Knitting Mills, Inc.*, 214 NLRB 1041 (1974), *enf'd*, 538 F.2d 312 (2d Cir. 1975) (unpublished opinion), and *Oak Apparel, Inc.*, 218 NLRB 701 (1975), the Board definitively held paid union organizers to be protected "employees" under Section 2(3), even if they were working for an employer for the express purpose of organizing that employer's employees. The Board has adhered to this interpretation, see *Pilliod of Mississippi, Inc.*, 275 NLRB 799 (1985); *Palby Lingerie, Inc.*, 252 NLRB 176 (1980); *Margaret Anzalone, Inc.*, 242 NLRB 879 (1979); *Henlopen Mfg. Co.*, 235 NLRB 183 (1978), *enf'd denied on other grounds*, 599 F.2d 26 (2d Cir. 1979); *Anthony Forest Products Co.*, 231 NLRB 976 (1977), and, in light of this Court's decision in *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177 (1941), has extended it to include paid union organizers who apply for work with the objective of organizing an employer. E.g., *Escada (USA), Inc.*, 304 NLRB 845 (1991), *enf'd without opinion*, 970 F.2d 898 (3d Cir. 1992); *Willmar Elec. Serv., Inc.*, 303 NLRB 245 (1991), *enf'd*, 968 F.2d 1327 (D.C. Cir. 1992), *cert. denied*, ___ U.S. ___, 113 S.Ct. 1252 (1993); *H.B. Zachry Co.*, 289 NLRB 838 (1988), *enf'd denied*, 886 F.2d 70 (4th Cir. 1989).

by the language of the definitions. In Section 2(2) of the Act, the term "employer"

includes any person acting as an agent of an employer, directly or indirectly, *but shall not include* the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof, or any person subject to the Railway Labor Act, as amended from time to time, *or any labor organization (other than when acting as an employer)*, or anyone acting in the capacity of officer or agent of such organization.

29 U.S.C. § 152(2) (emphasis added).

The definition of "employee" is set out in Section 2(3) and states

the term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise . . . *but shall not include any individual employed as an agricultural laborer, or in the domestic service of any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act, as amended from time to time, or by any other person who is not an employer as herein defined.*

29 U.S.C. § 152(3) (emphasis added).¹¹

¹¹ Section 2(5) defines a "labor organization" as any organization of any kind or any agency or employee representation committee or plan, in which

As the foregoing demonstrates, the definitions of these terms are interrelated and refer to each other. While the term "employee" is defined broadly, the term expressly excludes anyone who is employed "by any other person who is not an employer" as defined by the Act. Similarly, although the term "employer" is broad, it contains a number of exclusions, including one for a "labor organization." Through these two interrelated exclusions, Congress has spoken: individuals who are paid employees of a labor organization – including paid union organizers – are *not* "employees" under the NLRA because they are carrying out the union's organizational work.

The parenthetical to Section 2(2), which states that a union is an employer when it is "acting as an employer," confirms the conclusion that a union's agents are not "employees" when acting as a labor organization, that is attempting to organize an employer, like Town & Country. Indeed, this parenthetical statement was added for the limited purpose of subjecting labor organizations to the strictures of the NLRA in their treatment of their own employees. See S. Rep. No. 1184, 74th Cong., 2d Sess. 4 (1934), reprinted in 1 Legislative History of the National Labor Relations Act, 1935, 1099, 1102 (stating that "[i]n its

employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

29 U.S.C. § 152(5). While the Act defines a labor organization as comprised of employee-members, as this Court has emphasized, a labor organization has an identity distinct from that of its constituents. *Lechmere, Inc. v. NLRB*, 502 U.S. 527, 532 (1992).

relations with its own employees, a labor organization ought to be treated as an employer, and the bill so provides." See also *Office Employees Int'l Union v. NLRB*, 353 U.S. 313, 316 (1957) (holding Teamsters to be employer liable for unfair labor practices in interfering with right of its clerical employees to organize themselves). Congress understood that any broader application of "employer" status to labor organizations would "deprive unions of one of their normal functions," namely, organizing other employers. S. Rep. No. 573, 74th Cong., 1st Sess. 6 (1934), reprinted in 1 Legislative History of the National Labor Relations Act, 1935, 2300, 2305. See also S. Rep. No. 1184, 74th Cong., 2d Sess. 4 (1934), reprinted in 1 Legislative History of the National Labor Relations Act, 1935, 1099, 1102 (distinguishing between a union's relations with its "clerks, secretaries and the like" and its actions as an advocate of unionization).

Thus, Congress drew a sharp distinction between the union in its relationship with its own employees regarding wages, hours, and terms and conditions of employment and the union's organizing activities of other employers. The union, in short, was to be an "employer" only in the limited context of its relations with its own employees. Paid agents of labor organizations were intended to be statutory "employees" only when dealing with their own employer, the union, *not* when dealing with some other employer whom the union has targeted for organizing.

The Board, responding to this analysis, asserted that it was "immaterial" whether a union is a statutory employer because the paid union organizer draws his "employee" status from his attempted employment with

the targeted employer. *Town & Country, supra*, 309 NLRB at 1257-58 n.36. In support of this proposition, the Board drew an analogy between the union organizer and an agricultural or government worker (neither of whom is an "employee" under Section 2(3) of the Act) who seeks work with an "employer covered by the NLRA" and thus becomes an "employee vis-a-vis that new employer." The Board's summary conclusion, however, ignores the policies underlying the NLRA and the facts of the case under consideration. Thus, as a matter of fact, the paid union organizers in this case, including Hansen, who applied for work with Town & Country at the behest of the union, could only work at Town & Country in furtherance of the union's organizational goal, could only work for Town & Country so long as the union permitted them to do so, and were to be paid for fulfilling these obligations.¹² By contrast, the typical agricultural or federal employee seeking a second job does not labor under such restrictions, nor is he paid by his agricultural or federal employer for his outside efforts. Furthermore, as discussed above in Section I, as a matter of NLRA policy, Congress has struck a delicate balance between employers, unions and employees. This balance is destroyed when paid agents of labor organizations who apply for work in order to further their union's objectives

¹² Indeed, while Mr. Hansen received \$725 from Ameristaff, the employment agency retained by Town & Country to help it staff the project, he was additionally paid nearly \$1,100 by the union for his concurrent organizational efforts. See *Town & Country, supra*, 34 F.3d at 629 n.2.

are deemed indistinguishable from any employee who seeks a second job.¹³

¹³ The Board and its *amici* also look to Section 302 of the Labor Management Relations Act, 29 U.S.C. § 186, as evidence that paid union personnel could be both employees of unions and of targeted employers such as Town and Country. See *Town & Country*, *supra*, 309 NLRB at 1257-58 n.36. Section 302 restricts payments that an employer can legally make to an employee representative, but excludes payments "to any representative of his employees, or any officer or employee of a labor organization, who is also an employee . . . of such employer, as compensation for or by reason of his service as an employee of such employer." 29 U.S.C. § 186(c)(1). The Chamber submits that there is a difference between Section 302, which *permits* an employer to employ a union official if it wishes to do so without being guilty of bribery under the LMRA, and the Board's decision in this case, which *requires*, an employer to employ the paid union agent. Furthermore, the Board's logic in this regard is no more persuasive than that rejected by this Court in *Allied Chemical Workers v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 170-71 (1971), that retirees are "employees" under the NLRA because of their employee status under Section 302(c)(5) of the LMRA. 29 U.S.C. § 186(c)(5). There, the Court found there to be

no anomaly in the conclusion that retired workers are "employees" within § 302(c)(5) entitled to the benefits negotiated while they were active employees, but not "employees" whose benefits are embraced by the bargaining obligation of § 8(a)(5).

Id. at 170. So too here, there is no anomaly in Congress permitting employers and unions willingly to enter into agreements whereby union officials could be recognized as paid "employees" of the employer without violating the bribery statute, while at the same time *excluding* such individuals from the NLRA definition of "employees" whom employers *must* consider for hire without regard to their concurrent union employment for the express purpose of organizing that employer.

If the language of the statute is examined closely, it is clear that neither Hansen and his cohorts, nor the two paid union officials who applied for work at Town & Country, should be considered statutory employees when they sought a job with the Company to organize its workforce. When these paid union organizers apply for work in order to organize an employer, and are paid by their union to do so, they are carrying out duties as the union's agents vis-a-vis that employer – duties that bring them outside the ambit of protections provided to "employees" under the NLRA. Lacking "employee" status, they, like any other non-employee, could be rejected or dismissed by a targeted employer without violating the NLRA. Cf. *Fort Smith Chair Co.*, 143 NLRB 514, 518 (1963), *aff'd on other grounds sub nom., United Furniture Workers v. NLRB*, 336 F.2d 738 (D.C. Cir. 1964) (loss of "employee" status under the NLRA means loss of the Act's protection and an employer's motive for discharging those who have forfeited this status – including its otherwise unlawful desire to rid itself of the employees' union – is immaterial). In this respect, a paid union organizer is similar to a company supervisor who is also excluded from the definition of "employee" under Section 2(3) of the Act, and who may be discharged because of his union activities or sympathies. See, e.g., *Parker-Robb Chevrolet, Inc.*, 262 NLRB 402 (1982), *review denied sub nom., Auto Salesmen's Union Local 1095 v. NLRB*, 711 F.2d 383 (D.C. Cir. 1983).

The Board's disregard of statutory language consistent with the separate and diverse roles of employers and unions has led to the erroneous and paradoxical conclusion that the paid agents of one are "protected," and

therefore must be "hired" by the other. Such an intolerable result must be rejected, and its conclusion that paid union organizers are Section 2(3) "employees" set aside.

CONCLUSION

For the foregoing reasons, the Chamber of Commerce of the United States of America urges the Court to sustain the Eighth Circuit's judgment.

Respectfully submitted,

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